2003

State of Utah v. Travis Bertoch : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
TRAVIS BERTOCH,	:	Case No. 20030111-CA
Defendant/Appellant.	:	

BRIEF OF APPELLEE

Appeal From a Conviction for Possession of a Controlled Substance, a Third Degree Felony, in Violation of Utah Code Ann. § 58-37-8(2)(a)(i) (2002), in the Third Judicial District Court, Salt Lake County, Utah, the Honorable Dennis M. Fuchs, Presiding

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BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Pursuant to rule 11(i), Utah Rules of Criminal Procedure, defendant entered a conditional guilty plea to possession of a controlled substance (methamphetamine), a third degree felony, in violation of UTAH CODE ANN. § 58-37-8(2)(a)(i) (2002), reserving the right to appeal the trial court's denial of his motion to suppress. This Court has jurisdiction pursuant to UTAH CODE ANN. § 78-2a-3(2)(e) (2002).

STATEMENT OF ISSUES AND STANDARDS OF APPELLATE REVIEW

1. Is defendant precluded from attacking the validity of the weapons pat-down on appeal, where he conceded below that the pat-down was justified and argued only that its scope was exceeded when the trooper allegedly seized non-weapon contraband?

Below, defendant did not question the justification for the weapons pat-down, consequently, he is precluded from raising the issue for the first time on appeal. ***See State v. Richins***, 2004 UT App 36, ¶¶ 8-11, 86 P.3d 759 (reaffirming mandate that specific objections must be raised in the trial court or be waived on appeal); ***State v. Rochell***, 850 P.2d 480, 484 n.3 (Utah App. 1993) (strictly applying preservation requirement to appeal arising from conditional guilty plea).

2. Did the trial court correctly deny defendant's motion to suppress his pre-***Miranda*** statements on the ground that the statements were volunteered and/or made during a non-custodial investigative detention?

This Court reviews "'the factual findings underlying a trial court's decision to grant or deny a motion to suppress evidence . . . under the deferential clearly-erroneous standard, and the legal conclusions are reviewed for correctness, with a measure of discretion given the trial judge's application of the legal standard to the facts.'" ***See State v. Zesiger***, 2003 UT App 37, ¶ 7, 65 P.3d 314 (quoting ***State v. Moreno***, 910 P.2d 1245, 1247 (Utah App.), ***cert. denied***, 916 P.2d 909 (Utah 1996) (citing ***State v. Pena***, 869 P.2d 932, 935-40 (Utah 1994)), ***cert. denied***, 73 P.3d 946 (Utah 2003).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The Fourth and Fifth Amendments of the United States Constitution generally control the issues raised on appeal, but their wording is not determinative. Copies of the amendments and any cited statutes or rules are attached in *Addendum A*.

STATEMENT OF THE CASE

On December 18, 2001, defendant was charged with third degree felony possession of a controlled substance (methamphetamine), class B misdemeanor possession of a controlled substance (marijuana), class B misdemeanor possession of drug paraphernalia (marijuana pipe and rolling papers), and improper positioning of a license plate, a class C misdemeanor (R. 1-5). Following a preliminary hearing on March 14, 2002, defendant was bound over for trial (R. 31-32; R294: 28-29).

Defendant filed a pretrial motion to suppress the seized drugs and drug paraphernalia and statements made at the scene (R. 47-136, 172-80). ***See*** *Addendum C (Defendant's Motion and Memoranda)*. The State opposed the motion (R. 139-52). Defendant submitted the matter without an evidentiary hearing or oral argument based on the parties' memoranda, a transcript of the preliminary hearing, and the police reports (R. 77-136; R295: 2-5). On September 30, 2002, the trial court denied the motion to suppress (R. 224; R287: 3-6). ***See*** *Addendum B (Ruling)*. No written findings were entered (R. 285).[1]

On October 4, 2002, defendant entered a guilty plea to third degree felony possession and the remaining charges were dismissed (R296: 2-10). The Statement of Defendant in Advance of Plea did not condition the guilty plea on a reservation of the right to appeal (R. 229-36). During the plea hearing, however, the trial court sua sponte asked defendant if he was "reserving the right to appeal my ruling on your motion to suppress or not" (R296: 5).

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[1] Interestingly, the judge included in the record his handwritten notes outlining his oral ruling (R. 295). The notes are nearly identical to the oral ruling and both fully reflect the court's reasoning.

Defense counsel responded, "Yes, your honor, I would like to do that" (id.). The prosecutor did not respond (id.).[2]

On December 16, 2002, the trial court sentenced defendant to the statutory term of imprisonment of zero-to-five years, but suspended the sentence and placed him on probation on condition that he serve a year in jail, pay a fine, and complete an in-patient substance abuse program (R. 242-44; R288: 2-8). Confusion arose over defendant's notice of appeal and the court extended the time for filing (R. 246-56). On February 6, 2003, defendant timely appealed (R. 257-58).

STATEMENT OF FACTS[3]

On September 19, 2001, around 9:00 p.m., Utah Highway Patrol Trooper Christopher Witte observed a vehicle on SR 201 near Redwood Road (R294: 5-6).[4] The vehicle had no rear trunk lid and no license plate was attached (R294: 6). The trooper thought a license plate was lying flat on the ledge near the rear window, but could not see its numbers (R296:

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[2] A conditional plea requires the consent of the prosecutor, which consent should be affirmatively reflected in the record. ***See*** UTAH R. CRIM. P. 11(i) (*Add. A*). ***See also State v. Bobo***, 803 P.2d 1268, 1271 (Utah App. 1990) (holding that the record must indicate the conditional nature of a plea without any ambiguity). Despite the prosecutor's silence in this case, it is clear he was aware of the conditional nature of the plea and did not oppose it (R296: 2-10).

[3] The facts are stated in the light most favorable to the trial court's denial of defendant's motion to suppress. ***See State v. Chansamore***, 2003 UT App 107, ¶ 1 n.1, 69 P.3d 293.

[4] The State agrees with defendant that the preliminary hearing transcript mistakenly refers to Trooper Witte as Trooper Woody.

6, 13).[5] The trooper knew that when a vehicle is stolen, its license plate is often removed (R294: 15). Additionally, Utah law requires a license plate to be properly displayed (R287: 4). ***See*** Utah Code Ann. § 41-1a-403(3) (1998) (*Add. A*). The trooper followed the vehicle for a few minutes until it reached a safe location on I-15 and pulled it over (R294: 13-14).

Defendant was alone in the vehicle (R294: 7). When the trooper approached the driver's window, he immediately "smelled the odor of an alcoholic beverage emanating from" defendant (R294: 7; R287: 3). Defendant's eyes were blood-shot and, as they initially conversed, the trooper noted that defendant's speech was slowed (R. 79-80). The trooper, whose duties and training included DUI enforcement and drug recognition, believed defendant was possibly impaired and asked him if he had been drinking; defendant responded that he had had two beers (R. 79; R294: 8-10, 14). The trooper asked defendant for his driver's license and registration, which defendant produced, but the trooper decided to conduct field sobriety tests before "running" the documents (R294: 8, 14).

The trooper asked defendant to step out of the vehicle and "patted him down for my safety just to check for weapons" by patting the outside of defendant's clothing at the waistline and pockets (R294: 7-8, 15, 17). The trooper felt a hard object in defendant's left pants pocket which he suspected was a small marijuana pipe (R294: 9, 1). The trooper said, "This is a pipe" (R294: 19). Defendant volunteered that it was a marijuana pipe and said he had a baggie of marijuana in his other pocket (R294: 9, 17-18; R287: 3-4). Later, defendant

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[5] It is unclear if the trooper saw the plate before or after he approached the stopped vehicle, but in either case, he could not read the plate's numbers (R294: 6, 13).

volunteered that he had smoked marijuana the previous evening (R. 79; R287: 3). The trooper did not remove the pipe or marijuana and instructed defendant to leave the items in his pockets while he performed the field sobriety tests (R294: 9).

Defendant failed the field sobriety tests "miserably" and was arrested for DUI (R294: 8, 24-25; R. 80, 99).[6] Incident to the arrest, the trooper handcuffed defendant and removed the pipe and marijuana from his pockets (R294: 9, 24; R287: 4). The pipe contained burnt marijuana residue (R294: 9). Defendant's vehicle was impounded and searched; zig-zag rolling papers, typically used to smoke marijuana, were found inside (R294: 12). A blood draw was taken with defendant's consent (R294: 10). Defendant was advised of his ***Miranda***

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[6] Defendant exhibited multiple indicators of impairment. His breath smelled of alcohol, his speech was slow, his eyes were red and blood shot, the back of his tongue had a greenish tint and blisters, his eyes lacked smooth pursuit, both eyes exhibited distinct nystagmus at maximum deviation, he swayed, he had to raise his arms for balance, and he stepped off the line to maintain his balance (R. 79-80, 99; R294: 8, 24-25). The trooper agreed that defendant was not the "drunkest person" he had seen, but believed he was sufficiently impaired that he could not safely drive (R294: 8, 25). A subsequent preliminary screen of defendant's blood showed an alcohol level of .01 or no alcohol impairment and was negative for the presence of marijuana or metabolite (R294: 23; 105). ***But see*** *David Sandler,* ***Expert and Opinion Testimony of Law Enforcement Officers Regarding Identification of Drug Impaired Drivers****, 23 U. Haw. L. Rev. 151, 155 (2002),* (noting that a negative blood result does not necessarily rule out drug impairment or support that the individual is drug free). The final toxicology report was not included in the record prior to defendant pleading guilty.

For purposes of the motion to suppress, defendant admitted that he failed the field tests and exhibited signs of impairment (R. 51-53). In fact, he argued that his impairment rendered him incapable of knowingly waiving his rights pursuant to ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966) (R. 66-68). ***See*** *Add. C.* The court found that there was "no testimony whatsoever in any way that Mr. Bertoch was incapacitated to a point that he couldn't understand ***Miranda*** and denied the motion to suppress his post-***Miranda*** statements (R. 287: 5). Defendant has abandoned this argument on appeal.

rights and transported to jail (id.). During booking, the jailers removed a small plastic case from defendant, which defendant admitted contained methamphetamine (R294: 10-12).

SUMMARY OF ARGUMENT

Pat-Down: Defendant conceded below that the stop and pat-down were justified. He challenged only the seizure of the non-weapon contraband in his pockets, which seizure he alleged occurred during the weapons pat-down. The trial court properly rejected the argument because it found that no item was removed during the pat-down, but only incident to defendant's subsequent arrest. Defendant does not challenge this finding on appeal.

Instead, for the first time, he attacks the weapons pat-down. Because defendant did not challenge the justification for the pat-down below, the issue is not preserved or reserved by the conditional plea. Consequently, the entirety of defendant's Point I, which is predicated on the alleged illegality of the pat-down, should be summarily rejected.

Moreover, even if, arguendo, defendant's challenge on appeal were preserved and the pat-down determined to be illegal, defendant would not prevail. The trial court found that no physical evidence was obtained as a result of the pat-down, but only independently incident to the arrest and vehicle impound. Consequently, whether a weapons pat-down was permissible or not, the net outcome of the suppression ruling is the same: the drugs and paraphernalia were lawfully seized and, therefore, are admissible against defendant.

Pre-Miranda Statements: A temporary traffic detention does not constitute "custody" for Fifth Amendment purposes and, therefore, questioning during such an encounter does not require a ***Miranda*** warning. Additionally, regardless of the nature of the setting, a suspect's

volunteered statements do not implicate ***Miranda***. Here, the trial court correctly denied defendant's motion to suppress his pre-***Miranda*** statements because the statements were volunteered and/or did not result from custodial interrogation.

ARGUMENT

POINT I

BECAUSE DEFENDANT FAILED TO PRESERVE A CHALLENGE TO THE WEAPONS PAT-DOWN BELOW, HE MAY NOT ATTACK ITS VALIDITY FOR THE FIRST TIME ON APPEAL

Rule 11(i), Utah Rules of Criminal Procedure, permits a defendant to enter a guilty plea while reserving his right to appeal an "adverse determination of any specified pretrial motion." *See Add. A*. Reservation of the right to appeal, however, does not excuse preservation of the issue raised. ***See State v. Richins***, 2004 UT App 36, ¶¶ 8-11, 86 P.3d 759 (reaffirming that preservation rule applies to all issues raised on appeal and holding that a challenge under one subsection of a rule did not preserve a challenge under a different subsection of same rule); ***State v. Brown***, 856 P.2d 358, 360-61 (Utah 1993) (holding that preservation rule's specificity requirement is not met by casually referencing an issue below, but requires active presentation to the trial court of relevant legal authority and evidence); ***State v. Rochell***, 850 P.2d 480, 484 n.3 (Utah App. 1993) (strictly applying preservation rule in appeal from conditional plea and refusing to consider suppression theory raised for the first appeal). Indeed, rule 11(i) only permits appeals from pretrial motions presented to and ruled upon by the trial court. ***Cf. State v. Rivera***, 943 P.2d 1344, 1345-46 (Utah 1997); ***State v. Montoya***, 887 P.2d 857, 860 (Utah 1994) (both holding that "plain language" of rule 11

permits conditional appeals from the denial of any specified pretrial motion). In sum, rule 11(i) expands the category of potential appellants, but does not diminish their obligation to preserve arguments below or face waiver on appeal. ***See*** *Wayne R. LaFave & Jerold Isreal, 5* ***Criminal Procedure*** *§ 21.6(b) n.51 (2d Ed. & 2004 Pocket Part).*

Here, defendant impermissibly argues for the first time on appeal that the weapons pat-down conducted pursuant to ***Terry v. Ohio***, 392 U.S. 1 (1968), was not justified (*Br.Aplt. at 15-25*).[7] On appeal, defendant asserts that the trial court erroneously found the pat-down

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[7] ***Terry***, 392 U.S. at 23, concluded that "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." The Court held that if an officer could articulate a reasonable basis to suspect an individual was armed, the officer could frisk "every portion of the [person's] body," including patting down the individual's "arms and armpits, waistline and back, the groin and area about the testicles, and the entire surface of the legs down to the feet." ***Id.*** at 17 n.13 (citation and quotation marks omitted). ***See also State v. Warren***, 2003 UT 36, 78 P.3d 590 (extensively discussing suspicion necessary for ***Terry*** frisk).

Here, the trooper did not conduct a full ***Terry*** frisk, but briefly patted down defendant's waistline and his shirt and pants pockets for weapons before proceeding to the field sobriety tests (R294: 17). ***See United States v. Michelletti***, 13 F.3d 838, 843 (5th Cir.) (recognizing that a similar pat-down was less that the "intrusive exploration of a detainee's body . . . envisioned in ***Terry***), ***cert. denied***, 513 U.S. 829 (1994). During the preliminary hearing, the trooper briefly stated his safety concerns based on his suspicions that the vehicle was stolen and defendant was impaired (R294: 7-8, 15, 17). ***See State v. Strickling***, 844 P.2d 979, 984 (Utah App. 1992) (reaffirming supreme court's recognition in ***State v. Carter***, 707 P.2d 656, 660 (Utah 1985), that "'it is not unlikely that a person engaged in stealing another person's property would arm himself against the possibility that another person will appear unexpectedly and object strenuously'"). When defendant subsequently moved to suppress, he did not contest the reasonableness or sufficiency of the officer's explanation (R. 59-61, 175-76) and, consequently, there was no need to present additional evidence. ***See Richins***, 2004 UT App 36, ¶¶ 1 & 11 (recognizing that when a defendant fails to raise an issue, the court has no reason to take evidence on the issue or enter full findings to resolve it).

permissible without considering the totality of the circumstances (*id.*). According to defendant, the DUI arrest would not have occurred "but for" the illegal pat-down and, consequently, the physical and oral evidence seized incident to that arrest must also be suppressed (*Br.Aplt. at 29*). Additionally, defendant claims that his statements at the scene were not voluntary, but compelled through exploitation of the police illegality and, therefore, must be suppressed (*Br.Aplt. at 30-36*). None of these arguments were presented to the trial court. ***See*** *Add. C.*

Below, defendant did not seek an evidentiary hearing or oral argument (R295: 2-5). Instead, he submitted his motion to suppress on his extensive memoranda, a transcript of the preliminary hearing, and the police reports (R. 47-136, 172-80). ***See*** *Add. C.* Yet, in some 38 pages of legal memoranda, defendant never attacked the weapons pat-down, only the seizure of the pipe and baggie (R. 59-62, 64-66, 173-76). Moreover, he did not simply fail to attack the pat-down, he affirmatively conceded its permissibility (id.). His claim below was that the permissible weapons search did not justify the seizure of the non-weapon contraband (R. 64-66). According to defendant, this case was indistinguishable from ***Maryland v. Dickerson***, 508 U.S. 366 (1993), in which the validity of the pat-down search was also not challenged, only its scope (id.). In ***Dickerson***, 508 U.S. at 377, the United States Supreme Court accepted without analysis the reasonableness of the ***Terry*** frisk because Dickerson did not challenge it. The Court only addressed the issue of when non-weapon contraband could be seized during a weapons frisk. ***See id.*** at 378. The Court concluded that contraband could be seized if its illegal character was immediately apparent,

without resort to further search. ***See id.*** at 373-76. Based on this holding, defendant argued below:

> Applying ***Dickerson*** to this case, then, *Trooper Witte could conduct a* ***Terry*** *frisk to determine whether Mr. Bertoch was carrying a weapon* but could not seize an item that was not a weapon (and that could have been a lawful tobacco pipe), then continue to search the pipe located in the left pocket by searching the right pocket and seizing a "small baggie" which was clearly not a weapon and constituted no threat to Trooper Witte's safety or the safety of anyone else.

(R. 65-66) (emphasis added). ***See also*** R. 59-62, 173-76 for defendant's similar concessions.

Defendant's ***Dickerson*** argument was legally correct, but factually inaccurate. The trooper admitted that he strongly suspected the pipe in defendant's pocket was contraband, but could not positively determine whether it was a tobacco or marijuana pipe from its feel (R294: 9, 17-22). Consequently, ***Dickerson*** did preclude its removal. But defendant's underlying factual assumption—that the pipe and baggie were actually removed and seized during the pat-down—was incorrect. The preliminary hearing testimony established and the trial court correctly found that the pipe and baggie were not removed until defendant failed the field tests and was arrested for DUI (R294: 9; R287: 4). Their removal was, therefore, independent of the pat-down and solely incident to defendant's lawful arrest (R287: 4). ***See State v. Chevre***, 2000 UT App 6, ¶ 14, 994 P.2d 1278; ***State v. Moreno***, 910 P.2d 1245, 1249 (Utah App.), ***cert. denied***, 916 P.2d 909 (Utah 1996) (both recognizing that when a driver is arrested for any offense, including a misdemeanor offense, a search of the driver and vehicle may be conducted incident to the arrest).

Defendant also asserted below that he was in "custody" from the inception of the stop when the trooper smelled alcohol on his breath (R. 58-59). Because a ***Miranda*** warning was not given, defendant claimed that his ensuing statements—that he drank two beers, smoked marijuana the night before, and had a marijuana pipe and marijuana in his pockets—must be suppressed (R. 58-59). ***See*** *discussion, Point II.* He did not argue below that these statements were involuntary (id.). Nor did he argue that his detention was unlawful (id.). To the contrary, defendant conceded that the license plate violation supported the stop and detention and that his "skinhead" appearance unfairly enhanced the officer's suspicions that the vehicle was stolen (R295: 3; R. 71-76, 178-79).[8]

In sum, the thrust of defendant's arguments below was that the pipe and marijuana should be suppressed because they were non-weapon contraband seized during an otherwise legitimate ***Terry*** weapons search, and that his statements at the scene should be suppressed because he was effectively under arrest once the trooper smelled alcohol on his breath (R. 174-76). None of defendant's arguments below challenged the validity of the stop, detention, pat-down, or arrest. ***See*** *Add. C.* Consequently, the trial court only summarily noted that the stop, detention, pat-down, and arrest were "appropriate" or "lawful," and then proceeded to specifically rule on the arguments defendant raised, to wit: (1) whether defendant's at-the-

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[8] At the time of the stop, defendant was heavily tattooed and his head was shaved (R 71-76, 178-79). According to defendant, he looked like a "skinhead" or "straightedger," which prevented the officer from giving him the "benefit of the doubt" (id.). The trial court found no basis to conclude that the trooper unfairly profiled defendant based on his appearance (R287: 6). Defendant does not challenge this finding on appeal.

scene statements should be suppressed because no ***Miranda*** warning was given; (2) whether non-weapon items were seized during the course of the weapons pat-down; (3) whether the zig-zag papers were illegally seized; (4) whether defendant was too impaired to waive his ***Miranda*** rights after he was arrested, (5) whether the methamphetamine should be suppressed because the police varied in their descriptions of its plastic case, and (6) whether the detention continued due to improper profiling because defendant appeared to be a "skinhead" (R287: 3-6; R285). ***See*** *Add. B.* The court correctly and properly rejected defendant's claims (id.).

On appeal, defendant abandons his arguments below, but for the claim that his at-the-scene statements should be suppressed because no ***Miranda*** warning was given. ***See*** *discussion, Point II.* He still concedes that the stop was proper, but now argues that the DUI arrest was invalid because the field sobriety tests were "subjective" and "the DUI arrest was determined by the results of the illegal frisk rather than the results of the field sobriety tests" (*Br.Aplt. at 28-29*). Not only is this argument not preserved, it contradicts defendant's admissions and arguments in the trial court. ***Compare*** *Br.Aplt. at 28-29*, ***with*** *R. 66-68.*

Similarly, defendant abandons his trial court argument that the contraband was impermissibly seized during an otherwise permissible weapons pat-down (*Br.Aplt. at 6-7, 28*). Instead, defendant now argues that the weapons pat-down was illegal and everything—the statements, arrest, and contraband—should be suppressed because they were obtained through exploitation of its illegality (*Br.Aplt. at 12-35*). ***See State v. Thurman***, 846 P.2d 1256, 1262-64 (Utah 1993) (recognizing that where a prior police illegality proceeds

an otherwise valid search, the prosecution must establish that the legal search did not occur through exploitation of the illegality). Defendant's Point I, therefore, is predicated on one claim of error, that the trial court failed to fully consider the totality of the circumstances of the detention before stating the pat-down was lawful (*Br.Aplt. at 12-35*). But defendant's own actions negated any need to examine these circumstances: defendant admitted that a weapons pat-down was justified (R. 59-61, 173-76), and, therefore, the trial court had no reason to further question its justification. ***See Richins***, 2004 UT App 36, ¶¶ 8 & 11 (recognizing that a trial court is not provided notice that a full ruling is required when a defendant fails to raise a specific objection).

This Court should summarily reject consideration of defendant's unpreserved arguments. But even if assuming, arguendo, that the challenge to the pat-down was preserved and this Court determined it illegal, defendant would still not prevail on appeal for purposes of withdrawing his conditional plea.

The trial court found that no items were obtained as a result of the pat-down, but were seized independently incident to defendant's subsequent DUI arrest (R287: 4). On appeal, defendant does not challenge this factual finding, but claims—for the first time—that the DUI arrest was not the result of his failed sobriety tests, but was a product of the allegedly unlawful pat-down (*Br.Aplt. at 28-31*). Aside from being unpreserved, the argument has no evidentiary basis and is contradicted by defendant's factual admissions below. ***Compare*** *Br.Aplt. at 28-31*, ***with*** *R. 59-62, 173-76.* Consequently, even if the pat-down were determined to be illegal, only suppression of defendant's statements made during the pat-

down would result. ***Accord Thurman***, 846 P.2d at 1262-64. However, this result would not entitle defendant to vacation of his guilty plea.

Rule 11(i) requires a defendant to "prevail on appeal" before his conditional guilty plea may be withdrawn (*Add. A*). "To prevail on appeal" is a term of art, which means more than simply prevailing on an issue. ***See A.K. & R. Whipple Plumbing & Heating v. Guy***, 2002 UT App 73, ¶ 16, 47 P.3d 92. Utah recognizes various tests for determining who prevails, but all the standards are based on a common sense comparison of what a party sought to gain with what the party actually gained, that is, a party's "net judgment." ***See J. Pochynok Co., Inc. v. Smedsrud***, 2003 UT App 375, ¶ 12, 80 P.3d 563; ***Mountain States Broadcasting Co. v. Neale***, 783 P.2d 551, 556 (Utah App. 1989). Even under the most generous standard, a party claiming to have prevailed must "at a minimum . . . be able to point to a resolution of the dispute which changes the legal relationship between [the parties]" in a significant and not "purely technical or *de minimus*" way. ***See Texas State Teachers Ass'n v. Garland Independent School District***, 489 U.S. 782, 791-92 (1989) (in context of civil rights claim). Moreover, when multiple issues are involved, a party must win more than a single claim since there can never be two "prevailing parties." ***See R.T. Nielson Co. v. Cook***, 2002 UT 11, ¶¶ 22-26, 40 P.3d 1119.

Rule 11(i) does not require that a reserved pretrial motion be dispositive of the *prosecution of the case*. ***See Rivera***, 943 P.2d at 1345-46; ***Montoya***, 887 P.2d at 859-60. But the rule does require that a defendant prevail on the appeal of the reserved motion. ***See*** *Add. A.* Stated differently, a defendant, who conditionally pleads guilty, must obtain on

appeal a "net judgment" in his favor or otherwise significantly change the relationship of the parties in connection with the reserved motion. ***Cf. Rivera***, 943 P.2d at 1346 (recognizing that a conditional plea should be permitted to be withdrawn when the appellate ruling places the parties on new footing in any negotiations of the case). Thus, winning one part of a multi-issue motion to suppress is not "prevailing on appeal" unless the "win" significantly changes the outcome of the trial court's denial of the motion. Here, the legality of the pat-down does not impact the validity of the searches incident to arrest, impound, and booking and, consequently, does not change the overall outcome of the motion to suppress. ***See State v. Zesiger***, 2003 UT App 37, ¶ 11, 65 P.3d 314 (reaffirming "independent source doctrine" which precludes suppression where evidence is in fact obtained from a source independent of any illegality). ***See also State v. James***, 2000 UT 80, ¶¶ 14-16, 13 P.3d 576 (clarifying that where evidence would hypothetically have been inevitably lawfully discovered, suppression is not warranted).

In sum, defendant's arguments are waived and, even the arguments were preserved, resolution of them would not result in a net change in the denial of the motion to suppress.

POINT II

THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION TO SUPPRESS BECAUSE A MIRANDA WARNING WAS NOT REQUIRED DURING THE NON-CUSTODIAL INVESTIGATIVE DETENTION

Below, defendant argued that his statements at the scene should be suppressed because they were elicited without benefit of a ***Miranda*** warning (R. 58-59, 174). He claimed that from the time the officer smelled alcohol on his breath, he was effectively in

custody for purposes of the Fifth Amendment (R. 58-59).[9] On appeal, defendant asserts this same claim with a factual modification (*Br.Aplt. at 36-40*). He now claims that he was in custody and effectively under arrest "from the moment Witte felt the pipe" (*Br.Aplt. at 39*). The trial court's ruling properly negates both arguments.

The court found that defendant was not arrested until he failed the field sobriety tests (R287: 3). The court concluded that up until the arrest, defendant was detained, but not in custody for Fifth Amendment purposes (id.). Defendant knew he was being temporarily detain while the trooper investigated the unattached license plate violation and his possible impairment. He also must have recognized that field sobriety tests are a routine part of such an investigation. Though the officer was armed, he did not draw his weapon or otherwise threaten defendant (R294: 15-16). The encounter was low key, including the pat-down, which was kept to the most minimal level (R294: 7-9, 14-16). ***See*** *note 7, supra.* When the trooper discovered the pipe in defendant's pocket, he did not accuse defendant of illegal activity, but simply stated, "This is a pipe" (R294: 9, 19). Defendant then volunteered that it was a marijuana pipe and that marijuana was in his other pocket (id.; R287: 3). The trooper did not remove the items from defendant, but proceeded with the field sobriety tests

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[9] ***Miranda***, 384 U.S. at 444, requires that a suspect's Fifth Amendment rights be explained prior to a custodial interrogation. A suspect is "in custody" for purposes of ***Miranda*** if his "freedom of action is curtailed to a 'degree associated with formal arrest.'" ***State v. Mirquet***, 914 P.2d 1144, 1146 (Utah 1996) (quoting ***Berkemer v. McCarty***, 468 U.S. 420, 440 (1984). Traffic detentions are generally considered non-custodial and, therefore, do not implicate ***Miranda.*** ***See Berkemer***, 468 U.S. at 429-30; ***State v. Zepeda***, 2003 UT App 298 (unpublished opinion) (attached to *Addendum D* pursuant to rule 30(f), Utah Rules of Appellate Procedure).

(R294: 9, 24; R287: 4). When defendant failed the tests "miserably," he was arrested and handcuffed (R294: 8, 23). Nothing in this scenario suggests that defendant was in "custody" for ***Miranda*** purposes, though he subjectively recognized he was "caught." ***Compare State v. Carner***, 664 P.2d 1168, 1171 (Utah 1983) (holding that custody did not occur when a driver, detained on a public street, performed field sobriety tests); ***Zepeda***, 2003 UT App 298, ¶ 2 (analyzing various ***Berkemer-Mirquet*** factors and concluding that questioning a driver about possible drug usage did not render the traffic stop custodial), ***with Mirquet***, 914 P.2d at 1147-48 (holding that accusatory questioning of a driver, detained in a police vehicle, including ordering the driver to hand over his drugs, constituted custody and required a ***Miranda*** warning).

Whether in custody or not, the trial court also found that defendant's statements concerning the marijuana, the pipe, and his marijuana usage were volunteered (R287: 3). Below, defendant never claimed otherwise, only that his detention was custodial at its inception (R. 58-59). ***See*** *Add. C.* Now, for the first time on appeal, defendant argues that the presence of the armed officer overcame his free will and made his pre-***Miranda*** statements involuntary. ***Compare*** *Br.Aplt. at 32-33*, ***with*** *R. 68 & 174.* Because this challenge is not preserved, its consideration on appeal is waived.

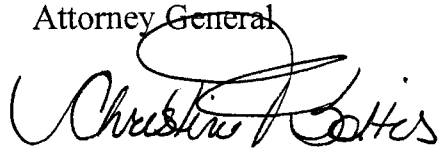
In sum, the trial court correctly denied the suppression of defendant's pre-***Miranda*** statements on the ground that they were volunteered and/or made during non-custodial interrogation.

CONCLUSION

Defendant raises only unpreserved or non-meritorious issues and, therefore, provides no basis to reverse the trial court's denial of his motion to suppress. His conviction should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of April, 2004.

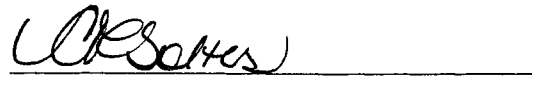
MARK L. SHURTLEFF
Attorney General



CHRISTINE F. SOLTIS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Plaintiff/Appellee were mailed to LORI J. SEPPI, SALT LAKE LEGAL DEFENDER ASSOCIATION, attorneys for Defendant/Appellant, 424 East 500 South, Suite 300, Salt Lake City, UT 84111, this 19 day of April, 2004.



Addenda

Addendum A

Rule 11. Pleas.

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(e)(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(e)(2) the plea is voluntarily made;

(e)(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(e)(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(e)(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(e)(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(e)(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(e)(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g)(1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved by the court.

(g)(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(h)(1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(h)(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(h)(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(i) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(j) When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code Ann. § 77-16a-103.

MOTOR VEHICLES

PART 4

LICENSE PLATES AND REGISTRATION INDICIA

41-1a-403. Plates to be legible from 100 feet.

License plates and the required letters and numerals on them, except the decals and the slogan, shall be of sufficient size to be plainly readable from a distance of 100 feet during daylight. **1992**

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Addendum B

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

TRAVIS BERTOCH,

Defendant.

ORIGINAL

Case No. 011919305

Ruling
Electronically Recorded on
September 30, 2002

BEFORE: THE HONORABLE DENNIS M. FUCHS
Third District Court Judge

For the Plaintiff:

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Salt Lake Cnty Dist Atty
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For the Defendant:

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Farmington, UT 84025-3845
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Transcribed by: Beverly Lowe RPR/CSR/CCT

1909 SOUTH WASHINGTON AVENUE
PROVO, UTAH 84606
TELEPHONE: (801)377-0027

PROCEEDINGS

(Electronically recorded on September 30, 2002)

THE COURT: Let's get on the record in the matter of Travis Bertoch, 011919305. This is on for motions. The Court heard argument last week, took it under advisement again so I could renew -- or review again all of the memorandums, which I have done.

I think we excused Mr. Bertoch from being here today, didn't we? Or is he supposed to be here?

MS. HINMAN: I believe, unfortunately, you said he needed to be here, your Honor, and I tried to reach him, and I also spoke with his brother. He did not have this on his calendar, and I haven't been able to reach him.

THE COURT: Okay. Well, he was here when I set it, so we can issue a warrant--

MS. HINMAN: Well, he was not here on Friday because he had been excused--

THE COURT: Okay. Well, I'm going to issue a warrant in the amount of $5,000, but you can cure that by just telling me that you've talked to Mr. Bertoch and you've been in touch with him, okay?

MS. HINMAN: All right, fine. Your Honor, we expect to be in West Valley City on a misdemeanor matter tomorrow morning, I'm sure, if not before then. I will--

THE COURT: Okay, I just need to know that he shows up

for that, okay?

MS. HINMAN: Thank you very much, your Honor.

THE COURT: All right. In regards to the motion, the Court is going to deny defense's motions for the following reasons. The first one was suppressing the statements defendant made after the stop. I'm denying it. The Court's considering it to be an investigatory stop. It was a DUI stop.

Even though he could smell alcohol -- the officer could smell alcohol -- that is not enough in and of itself a probable cause for an arrest. Mr. Bertoch was not under arrest. This matter has been heard by Courts many times. The Court did not consider him under arrest, and the questions asked by the officer are preliminary investigatory questions such as, "Have you been drinking," and I think in this particular case Mr. Bertoch volunteered that he had a couple of beers, but the Court does not feel that he was in custody, and therefore Miranda had to be given before the statements could be admitted.

Also, when the officer found the lump in his pocket and stated just to Mr. Bertoch that it felt like a pipe, the defendant responded on his own that it was a pipe, and then he also volunteered the information that he had marijuana and -- I can't -- I think a lighter in his other pocket. He also volunteered that he had been smoking marijuana. Again, these were still investigatory questions.

The Court finds that the Terry frisk was appropriate and legal. Once the officer smelled alcohol and took Mr. Bertoch out of the vehicle, he had a right to frisk him.

I went through the prelim, I went through the statements of the officer. I didn't find any evidence where the officer reached in his pocket and took these things out. It was Mr. Bertoch that volunteered that it was a pipe, and even though it could have been a pipe of tobacco or anything, at that point it didn't make a difference. There wasn't evidence about anything. The officer even told Mr. Bertoch to keep the matter -- the pipe and the other material in his pockets until later.

I think that the initial stop was lawful because the license plate was unlawfully displayed, and the Court of Appeals and the Supreme Court have both told us that basically no matter how minute, if a traffic violation takes place, that gives rise to probable cause for the initial stop.

In regards to the suppression of the pipe and the baggie containing a green leafy substance, the Court both finds that these were taken at the search incident to arrest. Mr. Bertoch was later arrested. At that point, the officer asked him to empty his pockets or to take out what was in his pockets, and that's when they were brought out.

In the suppression of the zig-zag papers, the Court

denies that motion. The Court either feels that one, it was found during the inventory search of the vehicle after the arrest was made, or it was found in the search incident to arrest at the time that Mr. Bertoch was arrested, even though it was done by a different officer.

Even though -- and again, even though the papers themselves are not illegal, I mean these are questions for the jury whether they think that zig-zag papers are drug paraphernalia or not. Based on the other evidence found and Mr. Bertoch's admitting he smoked marijuana, the Court can surely believe that it's for the use of marijuana, but I'm not the fact finder in this particular case. I'm only asked whether to suppress them or not, so it will be allowed.

Suppressing all the other statements because Mr. Bertoch did not understand the Miranda warnings, I have heard no testimony whatsoever in any way that Mr. Bertoch was incapacitated to a point that he couldn't understand Miranda. He said that he understood it, and he then proceeded to ask the questions. I think that burden is on the defense and I don't think they've met that burden.

Suppression of the battery case with the meth. Yes, there is some confusion as to whether it was a plastic case, a battery case that contained meth or a clear plastic case -- a white -- excuse me, some of it was. It was a white battery case containing meth. In other reports it was a clear case

that contained a white powdery substance.

One, I don't find those to be that much of a discrepancy between what is being described. Two, I think that that again is a question for the trier of fact as to whether they believe that was the particular battery case that was found on Mr. Bertoch or not.

Also, in regards to the chain, the Court isn't necessarily agreeing that it will come in, I'm just not suppressing it. If each individual officer can establish that that was the piece of evidence that they found and they handled, then the chain allows it to come in and then the jury gives it what weight they seem to think it deserves.

Just because there's a misidentification -- it's not even a misidentification. It's a different description of the same piece of evidence. I don't think in and of itself that is grounds to suppress the evidence.

In regards to the stopping -- a profile stop because Mr. Bertoch had his head shaved and because the officer might have thought that he was a straight-edger, I've just heard no -- there's been nothing to that.

There was a legitimate traffic violation that took place, and the officer stopped him for a legitimate reason. If the officer didn't have a traffic violation and yes, he just stopped him for no apparent reason whatsoever, then maybe the Court would look more seriously at that, but based on what I've

heard there's nothing to show that the stop was initially unlawful and was therefore a profile stop.

So based on that, the Court is going to deny each and every one of defense's motions. Do you want to set it for trial?

COURT CLERK: It is set for trial.

THE COURT: It is set for next week, okay.

COURT CLERK: No, this week, Wednesday, Thursday and Friday.

THE COURT: Okay. So as it stands right now it will go to trial, depending on where it sits with the other -- I don't -- we haven't even seen everybody as to the trials that are set for Wednesday, so I don't know what place setting it has.

COURT CLERK: Right now it's No. 2.

THE COURT: Right now it's a No. 2 setting. Okay?

MR. BERTOCH: Okay.

THE COURT: All right, thank you.

(Hearing concluded)

Addendum C

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4-22-01

Memo in Tooele w/o permission to file overlength memo 5-20

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, SALT LAKE CITY DIVISION
STATE OF UTAH

STATE OF UTAH,	**MEMORANDUM SUPPORTING MOTION TO SUPPRESS, FOR ADDITIONAL TIME TO PRESENT TRANSCRIPT AND FOR OTHER RELIEF**
Plaintiff,	
vs.	**Case No. 001-919305**
TRAVIS BERTOCH,	**Honorable Dennis M. Fuchs**
Defendant.	

Defendant Travis Bertoch submits this Memorandum and the attached and incorporated Exhibits in support of his Motion to Suppress ... and For Other Relief (the "Motion").[1]

TABLE OF CONTENTS

[1] All Exhibits, except Exhibits K, L, M and N are copies of discovery documents produced by Plaintiff. Quotations in bold type reproduce bold type from the documents; italics indicate emphasis has been added. Hand markings on two Exhibits, C and D, were apparently made by Mr. Bertoch's prior counsel, not Plaintiff or present counsel.

[2] The statements made in the "Statement of Facts" arise, almost entirely, from documents prepared by a Utah High Patrol Trooper or by others associated with his agency. They are set forth as "facts" for the purposes of this motion only, and Defendant does not, by relying on the statements to support his Motion, concede the statements quoted and reported and does not waive his right to contest, contradict and otherwise delimit the veracity, impact, weight and credibility of those "facts" at trial. For the purposes of the Motion, Defendant considers the bulk of the "facts" arising from the discovery documents to be used in a manner similar to the manner in which a civil litigant sets forth "facts" in support of a motion for summary

TABLE OF EXHIBITS

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judgment or partial summary judgment under Utah Rules of Civil Procedure 56: even assuming, *arguendo* and specifically without conceding the "facts:" are material and undisputed, the litigant may contend that summary judgment must be given in the litigant's favor as a matter of law. Defendant here asserts that he is entitled to the relief requested in the motion under the law, even assuming *arguendo*, that law enforcement statements would or could not be disputed.

STATEMENT OF FACTS

1. Utah Highway Patrol ("UHP") Trooper Christopher C. Witte first observed the Defendant Travis Bertoch "EB, SR201 onto I-15 and then onto I80." {DUI Report Section Number: RID1601-0873 signed by Trooper Witte, Exhibit ["Ex."] A,[1] *see also* Ex. N., a chronology showing dates and times set forth in the Exhibits.}
2. "On Wednesday the 19th September 2001, at approximately 2100 hours I was traveling eastbound on SR 201. Shortly thereafter I observed a maroon Ford Contour with a rear license plate that was lying on the right side of the back window's ledge. I followed the vehicle onto southbound SR 15(I-15), then onto eastbound SR 80 (I-80)" "at Mile Post No. 124." {Utah Highway Patrol Incident Report for Case Number 16-01-0873, p. 2, Ex. D, UHP Incident Report[2]; Ex. B; Information, Ex. C., Counts I -IV.}
3. Trooper Witte stopped Mr. Bertoch (the "Stop") on Wednesday, September 19, 2001 at "MILITARY TIME 2119." {DUI summons and Citations State of Utah Citation No. D 384861 signed by Trooper Witte, *see also* Ex. B, Summons; *see also* Ex. A.}
4. The Incident Report describes Mr. Bertoch's hair color as "Blonde" and states that he had "tattoes *[sic: tattoos]* over both arms." {Ex. A, p. 1; *but see* Ex. N: Mr. Bertoch's brother states that Mr. Travis Bertoch's head was shaved at the time.}
5. Trooper Witte states "The subject's vehicle rear plate was laid inside the vehicle in the rear window. It was not securely fastened to the outside of the vehicle." {Ex. B, Section V.}
6. At the Preliminary Hearing, Trooper Witte admitted he "did not run [the license plate number] at that time" of the Stop, before conducting a "Terry frisk" (described below.) {Testimony of Trooper Witte at Preliminary Hearing on taped transcript, March 14,

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[1] The DUI Report states "**Time Prepared:** 0059," approximately one hour after midnight during the morning after the initial stop. {Ex. A, p. 1.}

[2] The Incident Report indicates the Incident Date as "09/19/2001 21:03" and that the report was "Completed 09/20/2001 00:25." The Incident Report states "This report is accurate:" followed by space for the "Reporting Officer's Signature" and is signed "Christopher Witte" with the date "9/20/01 12:25:00 AM." {Ex. D, pp. 1, 3.}

2002, Transcript by certified court reporter to be appended as Ex. M when completed.}[3]

7. After making the Stop, "I [Trooper Witte] made contact with the driver, Travis Bertoch, and stated the reason for the stop." {Ex. D, p. 2.}
8. "I [Trooper Witte] smelled *alcohol coming from Mr. Bertoch.*" {*Id., emphasis added.*}
9. The DUI Report states, "**Odor of *alcoholic beverage*:** present on the subject's breath." {Ex. A, Section VII.}
10. The DUI Report states, "**Speech:** slow **Balance:** fair **Signs or complaints of injury or illness:** broken right ankle a couple of times **Other physical characteristics:** red blood shot eyes. Subject's tongue was tinted green with blisters on the back of his tongue." {*Id.*}
11. The vehicle was searched at "I-80 @ State Street" at "2129;" "**Evidence**: zig zag *[sic, Zig Zag]* papers" are found. {*Id.*, Section IX.}
12. Trooper Witte states: "I asked Mr. Bertoch how much he had to drink. He replied that he had had two beers to drink. {Ex. D., p. 2.}
13. "I [Trooper Witte] *removed Mr. Bertoch from the vehicle* and conducted a 'Terry frisk" prior to administering the Uniform Field Sobriety Tests." {*Id.* p. 2, *emphasis added.*}
14. While conducting the "Terry frisk" "I felt a hard object in the subject's *left* front pants pocket." {*Id., emphasis added.*}
15. Trooper Witte testified he had been armed with a Glock .40, a "tool" called an "ASP" and a container with a substance he described as "pepper spray" and that Mr. Bertoch was not free to leave from the Stop. {Ex. M.}[4]

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[3] The later report on the plate showed Travis Bertoch as the registered owner of the car. Mr. Bertoch's Driver's License proved "VALID [,] CLASS D [with] RESTRICTIONS corrective lenses" and no endorsements. {Ex. A.}

[4] Defendant requests the Court to take notice that a Glock .40 is a semiautomatic handgun. Defendant also requests the Court to take notice that, according to an employee at Skaggs Public Safety Uniforms & Equipment, 3828 South Main Street, Murray, UT, a well-known supplier of equipment to the law enforcement community, the ASP is a telescoping "baton," available in three lengths when extended: 21 inches, 26 inches and 31 inches and is thus similarly to the older-styled wooden batons commonly called "night sticks" or "billy clubs." Because the baton "telescopes," an officer can carry it in its short or telescoped mode more easily than the wooden batons that were long the standard issue to police officers. Trooper Witte adamantly refused to

16. "*I told Mr. Bertoch that the object was a pipe.*" {*Id., emphasis added.*}

17. "*He [Mr. Bertoch] informed me that it was. He also stated that he had lighters and marijuana in his right front pants pocket.* {*Id., emphasis added.*}

18. "I told Mr. Bertoch leave the items in his pockets." {*Id.*}

19. "When I [Trooper Witte] removed the subject from the vehicle to administer the FST's [field sobriety tests] I conducted a Terry frisk on the subject. I touched his *left* front pants pocket and felt a hard object. I informed him that is a pipe. He stated that it was. Also, I continued to search the subject for the pipe and found in this *[sic: his]* front *right* pants pocket a small clear plastic sandwich baggie containing a green leafy substance" (the "Baggie") {Ex. A p. 2, *emphasis added.*}

20. "I [Trooper Witte] took Mr. Bertoch into custody without incident at 2119 hours." {*Id.*}

21. "While conducting the vehicle inventory and impound, Trooper Hopkins [backup at the Stop] found a pack of "Zig-Zag" rolling paper. I [Trooper Witte] secured this in my vehicle also. {Ex. A, p. 2.}

22. In the Vehicle Impound Report signed by Trooper Hopkins, the "Property in vehicle" was "misc papers, 60 CD's, [crossed out word], cigarettes, Zig Zag, glasses." {Vehicle Impound Report No. A 959555, Ex. E.}

23. The Vehicle Impound Report notes, in the category "Visible damage:" "No trunk lid – rear end damage Rh [?] door." {*Id.*}

24. None of the reports signed by or attributed to Trooper Witte refer to "No trunk lid…" {See Exs. A, B, D and other Exhibits cited below.}

25. At the Preliminary Hearing, Trooper Witte testified, in substance, that he noticed that Mr. Bertoch's vehicle did not have a trunk lid and testified that was a "suspicion." {*See Ex. D, p. 1; Ex. M.*}

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describe the ASP as a "club" but called it a tool, but a telescoping baton can easily be used as a "tool" in the same manner that earlier police officers would have used a night stock or a billy club. Trooper Witte was clearly well armed in accordance with current law enforcement practice. Mr. Bertoch was not armed. Trooper Witte was controlling Mr. Bertoch from the moment he "removed" Mr. Bertoch from Mr. Bertoch's car. {*See Ex. D.*}

26. After making the search, Trooper Witte conducted the sobriety tests and describes his conclusions: "1. HGN [Horizontal Gaze Nystagmus[5]] 4/6 clues. Lack of smooth pursuit in both eyes. Distinct nystagmus at maximum deviation in both eyes. 2. OLS [One Leg Stand] 2 clues. Stated his right ankle had been broken a couple of times. 1-10 seconds he swayed. 11-20 he raised his arms for balance more than 6 inches from his side. 3. WAT [Walk and Turn]: 3 clues. Could not keep his balance twice by stepping off the line during the instructional phase. During the first 9 steps the subject raised his arms once and performed an improper turn by pivoting on both feet. Raised his arms during the second 9 steps more than 6 inches from his side. 4. PBT present for alcohol." {Ex. A, **VII.**}

27. Trooper Witte found "**Subjects** *[sic: Subject's]* **ability to follow instructions** poor." {*Id.*}

28. Trooper Witte asserts that, he "(read at 2130 hours)" the statement: "**Mr.** BERTOCH, **do you understand that you are under arrest for: Driving under the influence of alcohol and/or drugs or with a measurable amount of a controlled substance or metabolite in your body? (41-6-44, 44-6-44.6 UCA . . .?**" He states the "**Response if any:**" that "subject stated confusion." {*Id.*}

29. Trooper Witte states he asked, "**What is your response to my request that you submit to a chemical test?**" and Mr. Bertoch said, "I guess they can come take my blood." {*Id., see also the one-paged description of tests that may have been appended to Ex. A,* attached as Ex. F.}

30. After the arrest, search and tests "I [Officer Witte] transported Mr. Bertoch to the Chevron gas station on the corner of 2100 South and State Street. We met with Patti Wayman, who took a blood sample from Mr. Bertoch at 2205 hours...." {Ex. A, Ex. D, p. 2.}

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[5] *Webster's New World Dictionary*, 2d College Ed., Simon & Schuster © 1982 p. 979, defines "nystagmus" as "***n.*** [ModL. <Gr, *nystagmos,* drowsiness < *nystazein,* to be sleepy < IE. Base **sneud-,* to sleep] an involuntary, rapid movement of the eyeball, usually from side to side."

31. Then, "I [Trooper Witte] transported Mr. Bertoch [t]o the Salt Lake County Jail to be booked on his charges. I read Mr. Bertoch his Miranda rights at 2226 hours, and he agreed to speak with me (see attached D.U.I. report). Deputy Brandon Peterson (J-33) of the Salt Lake County Sheriff's Office processed Mr. Bertoch. While searching Mr. Bertoch, Deputy Peterson (J-33) discovered a small white plastic battery container, containing a white powdery substance. Mr. Bertoch stated that this was 'meth.'" **{***Id.***}**

32. "I [Trooper Witte] secured the white plastic battery container with it's *[sic: its]* contents in *my* right front pants pocket. I booked Mr. Bertoch on the charges of Improper display of License Plates, Driving Under the Influence (drugs), Possession of Drug Paraphernalia, Possession of Marijuana, and Possession of Controlled Substance. I secured the pipe with burned residue and the "Zig-Zag" rolling paper in evidence locker # 952 at 0019 hours at the section 16 office. I requested scientific analysis on the white powder contents of the white plastic battery case. I also secured the white plastic battery case in evidence locker #588 at 0025 hours at the Section 16 office. **{***Id.*, p. 2.**}**[6]

33. The Incident Report states the "Reason for Stop" was "Traffic," the "Description of Stop" was Improper display of rear license plate" and lists "Drugs Seized" "1 Grams Manufactured Compartment" on each of two lines; "Other Place of Concealment" was "pants pockets" and "Other Markings none." "Paraphernalia Seized: 1-glass pipe with burned residue, 1-pack of 'Zig-Zag'" rolling papers." On the last line of the form under "Subj No & Name" the typed entry is "1 Bertoch, Travis" but the "Offense" states "Receiving Stolen Property." **{***Id.* p. 4, **SUPPLEMENTAL FACT SHEET.}**[7]

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[6] The Court is requested to take notice that the Salt Lake County Jail is located at 3415 South 900 West, West Valley City, UT 84119 and UHP "Section 16" has an "Office Address" at 1842 West 2770 South, Suite 10, West Valley City, UT 84119." {Ex. D, p. 1.} The two addresses are approximately 2 1/8 miles apart.

[7] The statement "Receiving Stolen Property" on p. 4 of Ex. D is prejudicially outside the context of this case since p. 1 of Ex. D reports the identifies Mr. Bertoch as the "Registered Owner." Neither the Information {Ex. C} nor any other document produced for discovery alleges anything was stolen or that Mr. Bertoch received stolen property. Consequently, this irrelevancy should be stricken.

34. Trooper Witte states "Arrest and baker at 2119 hours. Miranda at 2226 hours." {*Id.* p. 3.}

35. "**I** [Trooper Witte] **served notice on subject Time served:** by me to his left front pants pocket @ 2232 hours at the jail." {*Id.* p. 4.}

36. The DUI report states that Trooper Witte's signature was typed at his direction on "**Date:** 9/20/01 **Time:** 0110." {*Id.* p. 4.}

37. A UHP "**SECTION 16 'SPECIAL OPERATIONS EVIDENCE AND PROPERTY REPORT"** form referring to Locker Number 592 lists three items, "1 glass pipe with burned residue 2 small clear baggy with green leafy substance 3 "Zig-Zag" rolling papers" with a "**CHAIN OF POSSESSION**: From Suspect To Troopers vehicle Date: 09/19/01 Time: @ 2119" and "From: Troopers' Vehicle To: locker #592 Date 09/20/01 Time: @0019." {Ex. G.}

38. A second UHP "**SECTION 16 'SPECIAL OPERATIONS'**" form referring to Locker Number 588 lists "1 small, *clear*, plastic battery case containing a white powdery substance" with a "**CHAIN OF POSSESSION**: From Subject To: Deputy B. Peterson J-33 Date: 09/19/01 Time: @ 2245 From: Deputy B. Peterson J-33 To: Trpr C. Witte 431 Date: 09/19/01 Time: @ 2245 From Trp Witte 431 To: locker # 588 Date: 09/20/01 Time: @ 0025 From Locker to Crime Lab Date: 9/20/01 Time: @ 1000." {Ex. H, *emphasis added.*}

39. The Preliminary Toxicology Report dated "10/05/2001" indicates Mr. Bertoch's blood alcohol level was "0.01"and that drug screening test results were "Marijuana or metabolite Blood NEG." {Ex. I ["eye"].} Driving with a blood-alcohol level of.08 grams or more is illegal in Utah. U.C.A. 41-6-44 (2) (a) (i).

40. The Probable Cause Statement appended to the Information states: "Your affiant bases probable cause on the following: The statement of Utah Highway Patrol Trooper Witte that on September 19, 2001, he observed the defendant, Travis Bertoch, operating a vehicle at I-80 and State Street in Salt Lake County. Trooper Witte observed that the rear license plate was not securely fastened to the outside of the vehicle and was lying in the rear window. Trooper Witte initiated a traffic stop and

observed the defendant behind the wheel. Trooper Witte detected and odor of alcohol on the defendant's breath. The defendant had slow speech and bloodshot eyes. The defendant admitted that he had consumed two beers and smoked marijuana. The defendant failed the field sobriety tests. A blood test indicated a blood/alcohol level of .01. Trooper Witte performed a Terry frisk and located a pipe in the defendant's *right* front pants pocket. Trooper Witte also located a plastic baggie containing a green leafy substance. The defendant admitted that the substance was marijuana. Upon searching the defendant's vehicle, Utah Highway Patrol Trooper Hopkins located a pack of zigzag rolling papers. As the defendant was booked into jail, Jail Staff located *a plastic container* with a white powdery substance. The defendant admitted that the substance was methamphetamine. The substance was sent to the Utah State crime Lab where methamphetamine was identified *in the in the plastic container.*" {Ex. C, *emphasis added.*}

41. In the "Salt Lake County No Warrant Arrest Fact Sheet," with a "PRINT DATE: 09/19/01 TIME: 23:12," Trooper Witte states, in relevant part: "I OBSERVED THE SUBJECT TRAVELING EAST ON I-80 FROM I-15. THE SUBJECT'S VEHICLE HAD THE REAR LICENSE PLATE DISPLAYED IN THE REAR WINDOW. I STOPPED THE SUBJECT ON EB I-80 JUST PRIOR TO THE STATE STREET OFF RAMP. I MADE CONTACT WITH THE SUBJECT AND DETECTED THE ODOR OF AN ALCOHOLIC BEVERAGE FROM THE SUBJECT. I ASKED THE SUBJECT HOW MUCH HE HAD TO DRINK, AND HE REPLIED THAT HE HAD HAD 2 BEERS. I REMEOVED THE SUBJECT FROM HIS VEHICLE TO PERFORM UFST'S. PRIOR TO THE TEST, I CONDUCTED A "TERRY FRISK". THIS REVEALED A GLASS PIPE WITH BURNED RESIDUE IN HIS LEFT FRONT PANTS POCKET, AND A SMALL BAGGY OF A GREEN LEAFY SUBSTANCE IN THE RIGHT FRONT PANTS POCKET. I ASKED THE SUBJECT WHEN HE HAD SMOKED MARIJUANA LAST. SUBJECT STATED THAT HE HAD SMOKED IT THE NIGHT BEFORE AT ABOUT 7 O'CLOCK. I ADMINISTERED THE UFST'S, WHICH THE SUBJECT FAILED. THE SUBJECTS *[SIC, SUBJECT'S]* TOUNGE *[SIC: TONGUE]* WAS TINTED GREEN AND HAD BLISTERS ON THE BACK OF THE TOUNGE *[SIC: TONGUE].* I ARRESTED THE SUBJECT FOR DUI AND POSSESSION OF MARIJUANA AND PARAPHERNALIA. ... I TRANSPORTED THE SUBJECT TO

THE CHEVRON AT 2100 SOUTH AND STATE STREET, WHERE A BLOOD SAMPLE WAS TAKEN FROM THE SUBJECT. I THEN TRANSPORTED THE SUBJECT TO THE SALT LAKE COUNTY JAIL FOR BOOKING. WHILE DEPUTY BRANDON PETERSON WAS SEARCHING THE SUBJECT AT APPROXIMATELY 2245 HOURS, HE DISCOVERED A SMALL WHITE BATTERY CASE CONTAINING A WHITE POWEDER. WHEN ASKED BY DEPUTY PETERSON, THE SUBJECT STATED THAT THE SUBSTANCE WAS 'METH'. I AMENDED THE CHARGES ON THE SUBJECT." {Salt Lake County No Warrant Arrest Fact Sheet, Ex. J, *emphasis added.*}

42. The Witness and Evidence list refers to the white powder as "evidence" to be produced. {Ex. N.}
43. At the Preliminary Hearing, a toxicology report allegedly identifying the white powder as methamphetamine was admitted without objection by Defendant's previous attorney. No copy of the report has been produced as of the date of this Memorandum, although a copy is being requested and will be submitted as Ex. P if or when received.
44. Mr. Bertoch had shaved his head and was not blonde at the time of the incident and had a painful crushed toe that affected his walking. {Ex. L.}

ARGUMENT

STATEMENTS ALLEGEDLY MADE BY MR. BERTOCH AT THE PLACE OF THE STOP MUST BE SUPPRESSED.

Trooper Witte followed Mr. Bertoch from State Road 201 near Redwood Road, onto I-15 from State Road 201 and then onto I-80, before stopping Mr. Bertoch at Mile Marker 124, approximately 500 feet west of the State Street exit off I-80. The Court is requested to take notice that the distance from Redwood Road (approximately 1700 West) to the location of the Stop is approximately 2 miles. Since Trooper Witte saw the Bertoch car at least by 2103 but did not stop Mr. Bertoch until 2119, Trooper Witte had approximately 16 minutes to observe a car traveling about 2 miles, which would suggest that the overall speed was less than 10 miles per hour through the State Road, freeway entrances and freeway distances, a speed

that would have given Trooper Witte ample time to observe the car and driver he followed. Trooper Witte wrote in his reports and testified that he observed that the license plate on Mr. Bertoch's car was not properly displayed, a factor he apparently was able to observe as soon as he observed the rear end of the car, especially since Trooper Witte testified at the Preliminary Hearing that the absence of a trunk lid was a "suspicion." Strangely, he never mentioned his "suspicion" in any of the reports he prepared the night of and after the arrest. Only Trooper Hopkins, who searched the car, felt the absence of the trunk lid important enough to record – but was preparing an impound report.

Driving with an improperly displayed license plate is a Class C Misdemeanor, ordinarily handled by the issuance of a summons and citation. Yet Trooper Witte stated he "removed" Mr. Bertoch from his car when Trooper Witte made the Stop. Trooper Witte testified that Mr. Bertoch was not free to leave the location of the Stop.

Trooper Witte was armed with a handgun, a "tool" [apparently a telescoping baton] and pepper spray.[8] Trooper Witte found Mr. Bertoch to be "slow" and taken into custody without incident. Mr. Bertoch was clearly under the control of a law enforcement officer from the time the Stop was initiated at 2119. In addition, Trooper Witte had "backup" from Trooper Hopkins, who was at the site of the Stop at least by 2129 when he conducted a search of Mr. Bertoch's car.[9]

The testimony and written reports from Trooper Witte show Mr. Bertoch became a suspect and a target of investigation for unlawful activity by 2103 when Trooper Witte first observed him going eastbound on State Road 201, near Redwood Road. Nonetheless, Trooper Witte did not give Mr. Bertoch a *Miranda* warning or ask Mr. Bertoch if he understood his rights under *Miranda* but still wanted to speak to the Trooper until 2226, at least 107 minutes after the actual Stop. The statements attributed to Mr. Bertoch during that entire period, prior to the receipt of *Miranda* warnings but when he was in custody and under the

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[8] The Court is requested to take notice that a "slow" person (as Trooper Witte says he found Mr. Bertoch) who has been "removed" from his car by a well-armed Trooper would be ill advised to try to leave the Stop.

[9] Trooper Witte's testimony indicates that he did not need the assistance of Trooper Hopkins to make the arrest but was, by himself, able to control Mr. Bertoch, making Trooper Hopkins free to search the car.

control of Trooper Witte, must therefore be suppressed. *Miranda v. Arizona*, 384 U.S. 436 (1966).[10] These alleged statements, according to Trooper Witte, include his alleged statements about having drunk beers, having smoked marijuana, having marijuana and lighters in his pocket and allegedly agreeing the tube Trooper Witte felt in Mr. Bertoch's *left* pocket (but continued to search for in Mr. Bertoch's *right* pocket) was the kind of pipe Trooper Witte said it was. Trooper Witte had an unarmed man who was driving a car without a trunk lid but with a license plate Trooper Witte chose not to "run" when Trooper Witte arrested him.

THE PARAPHERNALIA (PIPE) AND THE "BAGGIE" OF GREEN LEAFY SUBSTANCE MUST BE SUPPRESSED

Trooper Witte reports in writing and testified at the Preliminary Hearing that Mr. Bertoch told him, among the statements that must be suppressed under *Miranda*, that he had marijuana and a lighter in his right hand pocket – after Trooper Witte alleges that he was able to feel a tube or pipe through Mr. Bertoch's trousers during the course of the Terry frisk.

Terry v. Ohio, 392 U.S. 1 (1968) permits a police officer to perform a pat down to be sure a suspect is not armed – this has become, in the argot of Utah law enforcement – a search performed for "officer's safety." Trooper Witte testified at the Preliminary Hearing that he initiated the "frisk" because of "officer's safety," then later testified on cross examination that he had been "rear-ended" twice when he had previously made stops of other vehicles in the course of his service with the UHP since his appointment in 1997.[11]

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[10] The importance and application of *Miranda* are so well known that no further citation is required. The only possible exception to the suppression of statements during the pre-*Miranda* conversation might, *arguendo*, be Mr. Bertoch's statement, in substance, allowing a blood sample to be taken because of the implied consent doctrines that allegedly attach to the driving privilege. Since the Lab Report was negative for marijuana and metabolites and since the blood alcohol reading was .01 (some .07 below the statutory impairment quantity), the consent to the blood test is exculpatory. Cases following and distinguishing *Miranda* are, we submit, inapposite to the specific factual situation in this case – as reported by the arresting Trooper. Both the United States Constitution, Fourteenth Amendment application of the Fifth Amendment to the States and the Utah Constitution protections against self-incrimination apply to Mr. Bertoch at the Stop.

[11] Although searching for weapons in a pat-down or frisk under *Terry* is understandable, Trooper Witte's testimony that he had been "rear-ended" twice during stops has nothing to do with patting down a person who

In the course of the pat down, Trooper Witte says he was able to feel a "pipe" through Mr. Bertoch's pants pocket – on the left-hand side. Trooper Witte then, allegedly, continues his search because he was looking for the pipe. He states:

> When I removed the subject from the vehicle to administer the FST's I conducted a Terry frisk on the subject. I touched his *left front pants pocket and felt a hard object. I informed him* that is a pipe. [Alleged statement of Mr. Bertoch suppressed under *Miranda*.] Also, I continued to search the subject for the pipe and found in this *[sic: his] right* pants pocket a small clear plastic sandwich baggie containing a green leafy substance.

The Court should notice that a "small clear plastic sandwich baggie containing a green leafy substance" would not feel like a weapon. The Court should also notice that Trooper Witte's search of Mr. Bertoch's *right* pants pocket involved a sufficient amount of touching and feeling to locate, and apparently to withdraw, the small baggie.[12]

After feeling a hard object in Mr. Bertoch's *left* from pants pocket that Trooper Witte identified as a "pipe," Trooper Witte had no need to continue to search Mr. Bertoch "*for the pipe ... in [the] right* pants pocket."[13] The Court can, and should, infer that Trooper Witte was trying to bootstrap from a simple *Terry* frisk to search for a "weapon" when the Trooper himself identified a pipe – clearly not a weapon -- and *informed* Mr. Bertoch what was in his pocket. Bootstrapping to justify searching for something as small as a baggie in a separate pocket located on Mr. Bertoch's *right* side is simply prohibited. The attempt to bootstrap beyond the scope of a *Terry* frisk.

But Officer Witte even goes further – besides telling Mr. Bertoch what is in Mr. Bertoch's pockets, Officer Witte has stated, in writing, that his search from the hard item in

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has been "removed" by the Trooper from the person's car and who is under the control of the Trooper. Trooper Witte has offered no report or testimony of conditions that would indicate that Mr. Bertoch was in any position to cause a "rear-ending" to the detriment of Trooper Witte's safety at the Stop. The removal and frisk may have exposed Mr. Bertoch to the same potential exposure to being hit by an on-coming vehicle.

[12] Since no personal property report has been produced in discovery, we do not now know whether Trooper Witte found lighters allegedly described by Mr. Bertoch or whether the remark (which must be suppressed if in fact made) was verified by the Trooper's search and subsequent removal of the baggy from Mr. Bertoch's right pocket. The report may be potentially exculpatory.

[13] Trooper Witte could only continue the pat down to search for weapons, as more fully discussed *infra.*

the left pocket "REVEALED A GLASS PIPE WITH BURNED RESIDUE IN HIS LEFT FRONT PANTS POCKET, AND A SMALL BAGGY OF A GREEN LEAFY SUBSTANCE IN THE RIGHT FRONT PANTS POCKET."

A *Terry* frisk, through the clothing of a person under the control of a law enforcement officer, could not "reveal" that a pipe inside the pocket contains residue. A *Terry* frisk conducted through clothing could not reveal whether a pipe was made from glass or some other hard substance – ceramic or porcelain, for example.

At the Preliminary Hearing, Trooper Witte admitted he could not have determined whether the pipe contained or had any residue *while the pipe was in the pocket*, although he could determine that the item was not a weapon. Because Trooper Witte said (in reports prepared within two or three hours of the actual frisk at the Stop) that the *Terry* frisk "*REVEALED A GLASS PIPE WITH BURNED RESIDUE IN HIS LEFT FRONT PANTS POCKET,*" {*Emphasis added*.} The Trooper's statement should be viewed as an admission that he eventually removed the non-weapon to determine that it was made from glass rather than from some other hard material, that he removed it so he could see that it contained residue – when the only legitimate purpose of the frisk was to seek weapons to preserve personal safety.

And, when the Trooper told the "suspect" that what he felt in the left pocket was a pipe, Trooper Witte admitted in his testimony that the pipe could have been a pipe for tobacco – which is not "paraphernalia" and which is perfectly legal to carry.

Officer Witte could not claim that he had a "plain view" of the pipe through Mr. Bertoch's pocket and could not determine whether the "pipe" was a tobacco pipe or a marijuana pipe through the pocket, glass or ceramic, used or unused – and thus could not, without removing the pipe, reach any conclusions about the purpose or past use of the pipe. Officer Witte did not think the pipe and the baggy were weapons because *he told Mr. Bertoch to keep the items in his pocket* for some period of time after having felt around Mr. Bertoch's two pockets while patting down for "officer's safety" then moving his search from the *left* pocket where he felt the pipe and then moving the search to the *right* pocket to continue the search for something that had already been found. Trooper Witte could not assure himself

that the pipe was contraband or that it had evidence of having been used with a product deemed illegal or deemed to be a controlled substance.

Trooper Witte cannot convert the weapons pat down to an opportunity to get a "plain view" of the contents of Mr. Bertoch's pocket. Even if Officer Witte could have seen the pipe and the baggy by peering into a pocket that had a hole in it or looking into a pocket that was gapping open at the top, Trooper Witte could not improve his view. The "plain view" doctrine discussed in *Arizona* is inapposite to this facts asserted by Trooper Witte. The contents of Mr. Bertoch's pockets were not in plain view. Touching a tube that is a pipe not obviously contraband (as Trooper Witte admitted) does not justify seizure. "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed," *Minnesota v. Dickerson*, 508 U.S. 366, 373, *citing Sibron v. New York*, 392 U.S. 40, 65-66 (1968).

The minute Trooper Witte identified the tube in the left pocket as a "pipe," that could have been used for tobacco and that Trooper Witte could not determine whether it had been used or not without removing the item – and advised Mr. Bertoch to leave the item in his pocket *because Trooper Witte knew the item was not a weapon*, any claim or argument to justify removal and seizure of the "pipe" was extinguished and the search exceeded the weapons search permitted under the *Terry* frisk – the very case Trooper Witte used in his reports to describe what he was doing at the Stop.

Identifying the pipe in the left pocket does not justify removal of the baggy from the *right* pocket because a baggy carrying green leafy substances is not a weapon, as Trooper Witte clearly admits by telling Mr. Bertoch to leave it in his pocket until some point after Trooper Witte allegedly found it – and he would not have been justified in looking at it once he knew the right pocket did not contain a weapon. Trooper Witte was not justified in extending the search under *Terry* and could not rely upon his questions to Mr. Bertoch asked before Mr. Bertoch had been provided with *Miranda* warnings.

In one case reviewed by the United States Supreme Court, a police officer observed a piece of stereo equipment in his plain view. The officer turned the equipment around so he

could read serial numbers on the back – serial numbers that indicated the equipment was stolen property. The seizure of the equipment was suppressed because the officer could not, even having had a proper initial "plain view" enhance his plain view by turning the item around. *Arizona v. Hicks*, 480 U.S. 321 (1987).

THE ZIG ZAG ROLLING PAPERS AND THEIR SEIZURE SHOULD ALSO BE SUPPRESSED

The Zig Zag rolling papers, listed as physical evidence, should be suppressed both on the record produced by the Plaintiff and Trooper Witte and on the legality of owning and transporting "rolling papers." Although it is possible (but no one has offered any evidence) that the Zig Zags were in "plain view" once Trooper Hopkins began to search Mr. Bertoch's car, the search at the Stop was not part of an inventory after an impoundment and clearly was not part of a search for weapons to protect the officers' safety. Trooper Hopkins did not search the car until *after* Trooper Witte had "removed" Mr. Bertoch from the car and had been out of the car for at least ten minutes. Mr. Bertoch had no passengers in the car. He was outside the car, had no weapons and was under Trooper Witte's control as an arrested person at 2019. Trooper Witte described him as "slow" and unable to pass the sobriety tests – in fact, Trooper Witte testified that he "failed miserably" at the Preliminary Hearing.

Trooper Hopkins found miscellaneous papers, 60 CDs, cigarettes and the Zig Zags in the car and listed those items in documenting the impoundment of the car by Cartow. That document suggests the Zig Zags were left in the car. Since the Zig Zag papers are not illegal and do not constitute contraband in and of themselves and since they are small, not weapons and not harmful, they should not be construed as evidence against Mr. Bertoch.

Even if the Zig Zags were removed from the car, they prove nothing as "evidence." Because Trooper Hopkins found cigarettes during his search of the car, one could infer that Mr. Bertoch uses tobacco – and tobacco users can and do use "rolling papers" if they want to roll their own cigarettes, even though Trooper Hopkins did not find any loose tobacco in the

car.[14] Possessing Zig Zags means nothing when the possessor smokes.[15] And, strangely enough, Trooper Witte claims to have taken possession of the Zig Zags at 2019, ten minutes before Trooper Hopkins found them in his search at 2029. The purpose and the chain of custody of the Zig Zags are so inherently lacking in probity and credibility that they should be suppressed on the facts produced in discovery.

THE *TERRY* SEARCH WAS IMPROPERLY EXPANDED; ITS FRUITS MUST BE SUPPRESSED.

As stated, Trooper Witte admits he himself identified a "pipe," not a weapon, in Mr. Bertoch's *left* pocket then searched further for the "pipe" by going to the right pocket where he extracted the baggie –not a weapon. Trooper Witte even told Mr. Bertoch to keep the pipe and the baggie in his pocket while Trooper Witte concerned himself with sobriety tests.

Trooper Witte's written statements, prepared immediately after the arrest and transport of Mr. Bertoch to the Salt Lake County Jail, raise the question whether an officer who conducts a Terry frisk and *feels* a "lump" in a person's pocket can constitutionally seize the lump as "contraband" under *Terry v. Ohio*, 392 U.S. 1 (1968). The United States Supreme Court says *no*. *Minnesota v. Dickerson*, 508 U.S. 366 (1993)(White, J.). In *Dickerson,* the Supreme Court affirmed the Minnesota Supreme Court, which suppressed the "lump"

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[14] Even though the Troopers did not find loose tobacco in the car or on Mr. Bertoch's person, no one can conclude that the Zig Zags were used to smoke illegal products. Mr. Bertoch can carry papers in his car so he has them available when he chooses to use loose tobacco or loose legal herbal compounds. He might have run out of loose tobacco – since the marijuana must be suppressed, as argued above, the Zig Zags are useless as evidence of a crime. Trooper Witte's report that Mr. Bertoch said he had marijuana and lighters in his right pocket, which must be suppressed under *Miranda*, does not explain what happened during the search – Trooper Witte does not at any point claim to have found lighters – no produced property inventory indicates that lighters were present. One can ask whether Mr. Bertoch actually made the alleged statement – which must, of course be suppressed under the "facts" alleged by Trooper Witte.

[15] The Court is requested to notice that legal, herbal substitutes for tobacco that do not contain marijuana in any form or under any other name, are available to those who want to smoke legally but do not want to use tobacco. For example, Jeanie's Smoke Shop, 156 South State, Salt Lake City, Utah 84111 carries an herbal cigarette (with no tobacco) and an herbal non-tobacco product that substitutes for chewing tobacco and believes other companies have a broader range of non-tobacco products. Both the pipe and the Zig Zags can be used for such products as well as for tobacco.

removed from Dickerson's pocket. Officers had stopped Dickerson and frisked him for weapons under *Terry.* Dickerson did not complain against the frisk for weapons. He moved to suppress the "lump" seized from his pocket (which proved to be cocaine), and the Minnesota Supreme Court suppressed. The United States Supreme Court rejected much of the Minnesota court's reasoning, but affirmed and adopted its own standards, examining an attempted analogy to the "plain view" doctrine, and also stating:

> Under [the plain view doctrine from *Michigan v. Long*, citation omitted], if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. *See Horton v. California,* 496 U.S. 128, 136-137 (1990); *Texas v. Brown,* 460 U.S. 730, 739 (1983) (*plurality opinion*). If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object – i.e., if "its incriminating character [is not] 'immediately apparent,' *Horton, supra*, at 136 – the plain view doctrine cannot justify its seizure. *Arizona v. Hicks,* 480 U.S. 321 (1987).
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> The very premise of *Terry*, after all, is that officers will be able to detect the presence of weapons through the sense of touch, and *Terry* upheld precisely such a seizure. Even if it were true that the sense of touch is generally less reliable than the sense of sight, that only suggests that officers will less often be able to justify seizures of unseen contraband. . . . Where, as here, "an officer who is executing a valid search of one item seizes a different item," this Court rightly "has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or exigency, into the equivalent of a general warrant to rummage and seize at will." [*Citation omitted.*] Here, the officer's continued exploration of respondent's [Dickerson's] pocket after having concluded that it contained no weapon was unrelated to "[t]he sole justification of the search [under *Terry*:] . . . the protection of the police officer and others nearby." [*Citation omitted.*] It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize . . . and that we have condemned in subsequent cases.

Dickerson, supra, 508 U.S. at 373, 377, 378. A typescript Internet copy of *Dickerson* is attached for the convenience of the Court as Ex. L.

Applying *Dickerson* to this case, then, Trooper Witte could conduct a *Terry* frisk to determine whether Mr. Bertoch was carrying a weapon but could not seize an item that was not a weapon (and that could have been a lawful tobacco pipe), then continue to search for

the pipe *located in the left pocket* by searching the *right* pocket and seizing a "small baggie" – which was clearly not a weapon and constituted no threat to Trooper Witte's safety or the safety of anyone else.

Thus, under the facts described by Trooper Witte – with Trooper Witte moving his search from left to right because he found something he told Mr. Bertoch was a "pipe," then removing a small baggie containing a "green leafy substance" – the paraphernalia and the baggie that reportedly contained marijuana, must be suppressed under *Dickerson*. With the suppression of the pipe and the baggie, Counts II and III must be dismissed – but for the ambiguous finding of the Zig Zags – which should also be suppressed, as argued above.

POST-*MIRANDA* STATEMENTS ALLEGEDLY MADE MUST BE SUPPRESSED ON THE FACTS ASSERTED BY LAW ENFORCEMENT.

Mr. Bertoch, Slow and Confused, Made No Knowing Waiver of Miranda Rights. Trooper Witte followed Mr. Bertoch to observe his driving pattern but had nothing to criticize in his written reports except the improper display of the license plate and, in his later testimony, the absence of the trunk lid. Trooper Witte said Mr. Bertoch could not perform field sobriety tests. Trooper Witte elicited statements from Mr. Bertoch (which, as argued above, must be suppressed), which Mr. Bertoch gave with forthcoming candor but without appreciation of the potential adverse effects of his cooperation.

Mr. Bertoch was revealed as a user of tobacco and (as must be suppressed) some marijuana. Trooper Witte describes him as having "slow" speech and only "fair" balance. Trooper Witte remembers Mr. Bertoch said he had broken ankles "a couple" of times but did not note that Mr. Bertoch was suffering from a crushed toe. Trooper Witte reported that Mr. Bertoch (who must wear corrective lenses when driving) had bloodshot eyes, a green tongue and blisters on the back of his tongue. Officer Witte's report of the sobriety tests indicates that both Mr. Bertoch's eyes lacked "smooth pursuit" and that he had distinct nystagmus,

apparently meaning that his eyes had involuntary, rapid movements.[16] Trooper Witte states that Mr. Bertoch swayed and needed his arms for balance (at distances greater than 6 inches from his side), improperly pivoted on both feet and twice suffered from imbalance. While the lab results show that Trooper Witte erroneously attributed these "clues" as indicating excessive alcohol or to marijuana allegedly smoked about 26 hours before the Stop. The chemical tests disproved the presence of both alcohol and marijuana/metabolites.

Although Trooper Witte apparently did not have an immediate report on the blood test during on September 19, he could have looked at what he did in fact have before him, especially when wrote that Mr. Bertoch stated he had confusion when he allegedly heard a question about being arrested for alcohol or drugs.

Trooper Witte was controlling a man who had a driver license record with no allegations of driving under influence, was slow of speech, confused by an arrest statement, uncertain of his physical balance, uncertain how to respond to the directions for the steps in a sobriety test requiring careful attention to instructions, forthcoming and cooperative, patient with and non-resistant to arrest and to the inherent indignity of standing at a gas station at an extremely busy intersection while a technician took blood from his arm, very likely worried about being arrested and about the impoundment of his car and undoubtedly tired after working at a scaffolding company, cleaning a room at his house and putting the dishes away, being stopped after having been followed by a UHP Trooper for approximately 16 to 19 minutes then being searched, tested for sobriety, being booked into Jail, undergoing an additional search and then being told he had legal rights. This man, found slow of speech and confused about chemical testing, allegedly agreed to continue talking to law enforcement officers after he heard a warning 107 minutes after Trooper Witte stopped him and more than two hours after the Trooper started following him. And, according to Trooper Witte had blisters on the back of his tongue – which suggest a painful mouth – and, according to his brother, a painful crushed toe that adversely affected his walking.

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[16] Those eye problems may explain part of Mr. Bertoch's need to wear corrective lenses. Since the Court was able to see Mr. Bertoch at the Preliminary Hearing, the Court should notice that Mr. Bertoch was wearing glasses (not contact lenses) with some thickness.

Mr. Bertoch was not, at that time, a person fully capable to enforce his *Miranda* rights – any statements attributed to him should be suppressed. At minimum, *Miranda* rights cannot and should not be easily forgotten when a person faces the stress of arrest and processing.[17]

THE USE OF THE ALLEGEDLY SEIZED "METH" VIOLATES CONSTITUTIONAL AND LEGAL STANDARDS.

The circumstances arising from and surrounding the seizure of the alleged "meth" require that the seizure be suppressed in order to assure Mr. Bertoch of constitution standards of due process and equal protection of the law. The Court is respectfully referred to the timeline (with number fact paragraphs) to demonstrate the that must be reached here.

After taking Mr. Bertoch to the jail – presumably not because he had failed to display his license plate in an approved manner – but because Trooper Witte suspected him of being under the influence of alcohol or marijuana or its metabolite (a "suspicion" subsequently disproved by chemical analysis), a jail deputy searched Mr. Bertoch and allegedly found, according to Trooper Witte, a "white" plastic battery case at 2245 on the night of the Stop. On two reports prepared by Trooper Witte, Trooper Witte describes the battery case as "white" and containing a white powdery substance.

Trooper Witte placed the "white" plastic battery case into his own pocket.

Trooper Witte carried the "white" plastic battery case around in his own pocket until he went to an evidence locker approximately two miles away from the jail where Mr. Bertoch was being held at 0025, 10 minutes – *one hour and forty minutes* – after the jailer allegedly conducted the search. Trooper Witte describes the batter case in the Incident Report dated

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[17] Mr. Bertoch does not here claim that any of the law enforcement officers treated him with "unnecessary rigor" under Utah Constitution Article I Section 9 or that they acted cruelly or unusually under the Eight Amendment of the United States Constitution. He does request the Court to infer and to conclude that the circumstances primarily described by an educated and very well-prepared witness, as Trooper Witte confidently portrayed himself at the Preliminary Hearing, demonstrate the stress, discomfort and overwhelming context and nature of Mr. Bertoch's experience and the ease with which a forthcoming laborer can become enmeshed into an accusatory and even intimidating atmosphere of criminal allegation, incarceration and personal/physical loss.

9/20/01 at 12:25 a.m. (0025 in military time). Trooper Witte described the battery case as "white" in the "No Warrant Arrest Fact Sheet" printed on 09/19/01 at 23:12.

But, the Evidence and Property Report, {Ex. H}, which describes the chain of custody of the batter case from the jail deputy at 2245 on 09/19/01 to Trooper Witte at 2245 on 09/19/01 (when Trooper Witte placed the white batter case in his pocket), the battery case placed into Locker Number 558 by Trooper Witte at 0025 on 09/20/01 and then leaves the Locker for the Crime Lab at 1000 on 09/20/01 is not white but is "clear." The Clerk named as the Section 16 Evidence Custodian and as the Clerk Receiving Property initialed the form describing a "small *clear*, plastic battery case containing a white powdery substance." {E*mphasis added.*}

By the time the probable cause statement is attached to the Information for review by a Deputy District Attorney on December 13, 2001, the battery case has become "a plastic container with a white powdery substance."

The witness and evidence list describe the alleged "evidence" as "white crystal powder" without reference to its container.

How did the "white" battery case described by Trooper Witte as having been found by the jail deputy and handed by the jail deputy to Trooper Witte at 2245 and described by Trooper Witte as being "white" in a report printed at 2325 and in a report completed at 0025 after being carried in Trooper Witte's pocket for 100 minutes turn into a "clear" container when placed into the locker and when removed from the locker? Trooper Witte went approximately two miles from the jail where he took Mr. Bertoch to the Section 16 office at some point after 2245. He does not describe having a partner with him.

Perhaps because the discrepancy from a white battery case to a clear battery case was noticed, the unsigned probable cause statement submitted to the Deputy District Attorney as part of the Information refers only to a "plastic container." The evidence allegedly supporting the first count (felony possession of methamphetamine) then become a "white crystal powder" without reference to any kind of container -- but the "evidence" allegedly

supporting the charge of marijuana possession is the systematically and consistently described container and contents "small baggy with green leafy substance."

No one can possibly determine beyond reasonable doubt just what color of container was allegedly found by the jail deputy and put into the pocket of Trooper Witte – where it allegedly remained for 100 minutes – before it became a "clear" battery case before becoming a "plastic container" for purposes of the probable cause statement on the Information. Somewhere between the alleged discovery of the "white" battery case and the delivery of the "clear" battery case to the evidence clerk, the battery case becomes different. It is enough "different" to become an undescribed "plastic" container about 84 days later, December 13, 2001.

The only real "evidence" of felony possession of methamphetamine is thus tainted, unreliable – and the alleged chain of custody is flawed and impeached by the records of the Utah Highway Patrol. We do not know why Trooper Witte describes a "white" plastic battery case having been given to him at 2245 by the jail deputy, still described as "white" plastic in the report printed at 2312 and in the report completed at 0025 – yet placed in a locker as "clear" plastic at the same time and transferred to the crime lab at 1000 as "clear" – and back-stated on the chain of custody as having been "clear" when first found and given to Trooper Witte. All we know is that the official UHP documents describe two colors for the battery case: white and clear and that the subsequent probable cause affidavit drops the description from either white or clear and refers only to a "plastic" container and the evidence list refers to "white crystal powder." We have no way to determine where any white crystal powder came from – at least without finding a gross inconsistency in the chain of custody and without looking for the unexplained change that occurs in the records during the 100 minutes in Trooper Witte's pocket – or at least in the 9 hours and 35 minutes between the deposit into the Locker to the delivery to the crime lab.

No one can be asked to defend against such indefinite "evidence" and such inconsistent assertions. No one can legitimately be convicted beyond a reasonable doubt by alleged "evidence" with such a checkered and inconsistent history. The so-called "evidence,"

now consisting only of a white crystal powder, must be suppressed; it is now inherently and unquestionably lacking in probity and in legitimacy. The facts produced by the prosecution through the law enforcement officers are exculpatory; the facts require suppression/

THE EXPANSION OF THE STOP FROM A TRAFFIC VIOLATION TO AN ARREST FOR AN ALLEGED FELONY AROSE FROM PROFILING, NOT FROM ANY LEGITIMATE CONCERNS

The Fourteenth Amendment to the Constitution of the United States Constitution requires that the States accord equal protection of the law to all persons. The Utah Constitution requires uniform operation of law. Utah's Constitution affirms that Utah is inseparable from the Union of the States, that is the United States, and thus its total adherence to the Constitution of the United States. The Utah Constitution guarantees the free exercise political thought and free expression and uniform operation of law. {*See* United States Constitution, Amendment 14; Utah Constitution, Article I, Sections 1, 2 3, 24.} These noble and, in many cases, self-executing principles of constitutional government, form the backdrop against which the Stop of Mr. Bertoch, a man with a shaved head and tattoos on his arms, must be examined.

The current and lively national debate over profiling by law enforcement officials in performing their actions, primarily in a racial context, began shortly after the horrendous and devastating attacks on the United States on September 11, 2001, only 8 days before the arrest of Mr. Bertoch. Because the attacks have been attributed to a group of radical terrorists of one religious and ethnic background, a number of ugly, vengeful and allegedly retaliatory acts were committed in the aftermath of September 11, 2001, including an arson at a restaurant near 2100 South State in Salt Lake City and the denial of transport to two persons with airline tickets from Minnesota to Salt Lake City.

The President has gravely counseled against retaliatory behavior and blanket pre-judgments on any basis, as have numerous other national and local leaders in varying walks

of life. Enhanced airport safety measures and calls for greater citizen vigilance and diligent reporting of suspicious activities and conduct has been counseled, but those are not to be based upon personal appearance, ethnicity, religious practice, political statements or any other prejudice.

The concerns about terrorism and retaliation, quite logically, have given rise to a lengthy debate over and allegations that law enforcement at all levels engages in profiling – racial or ethnic profiling garnering the greatest amount of attention – with religious and even political discrimination inherent in the debate and the search for preservation of rights and freedom while defending against terrorism and even other misconduct.

From the totality of the circumstances set forth by law enforcement in the reports and statements in this case and from the supplemental information that Mr. Bertoch has tattoos on both of his arms and shaves his head and from Mr. Bertoch's appearance at the Preliminary Hearing and other court appearances, this Court can see and can conclude that Mr. Bertoch looks like a "skinhead." Like a number of other ethnic, religious or political groups that can be identified visually, being a "skinhead" carries a prejudged and thus a prejudicial burden upon those who look like skinheads. The reputation of skinheads, as a group, is based on rumor, assertion and sometimes upon a few facts about specific circumstances, specific issues and specific persons who identify themselves as "skinheads." These generalizations expand – like any other stereotype -- to impugn all those who look like members of the "skinheads" category or classification.

Evidence of a prejudicial attitude toward "skinheads" can be inferred from the law enforcement statements and testimony in this case. Although Trooper Witte specifically claims in his written reports that he observed an improperly displayed license plate and never himself mentioned the absence of the trunk lid on Mr. Bertoch's car, at the Preliminary Hearing Trooper Witte testified forcefully that the absence of the trunk lid, while admitting that is not in itself illegal, constitutes "suspicion." He followed the car at slow speed for some two miles, about 16 minutes before making the Stop, although the improper display of the plate was easily noticed. Trooper Witte also states that he decided against running the license

plate (which he saw on the shelf behind the back seat of the car) until some time after he instituted the Stop. Rather than checking the plate, Trooper Witte removed Mr. Bertoch from his car and frisked him for weapons – although the worst thing Officer Witte observed while he followed Mr. Bertoch for approximately 16 minutes from Redwood Road and SR 201 (approximately 2100 South) to I-15 and then onto I-80 near State Street was the improper display of a license plate and the absence of a trunk lid.

Just what "suspicion" does the absence of a trunk lid raise?

If the driver had been a 50-year old woman with gray hair, the "suspicion" would be that her trunk lid had been damaged or its springs/closing devices had been broken and she was awaiting repair and replacement of the lid.

If the driver had been a clean-cut college student with a tan, the "suspicion" could easily have been that the student had been hauling his lawn mower and tools around to provide landscape services as his summer job – or that he was getting ready to haul a snow blower around in hopes of going from landscaping to snow removal as the fall season went from warm weather to winter.

If the driver worked with a scaffolding company crew, as does Mr. Bertoch, the "suspicion" should have been that he hauled equipment to and from job sites – or that he also did landscaping work or anticipated performing snow removal or had suffered damage to his trunk lid or its springs and was awaiting repair – or any number of other legitimate and logical reasons why someone would drive his car while the trunk lid was missing.

And the fact that Trooper Witte could see that a license plate was lying flat in front of the rear window could even have raised another "suspicion:" that the driver had leaned the license plate against the window so it would be visible, but as the driver went along, he had hit bumps or turned corners, causing the license plate to fall into a flat position.

But not Trooper Witte, who could see the license plate lying flat and must just as easily have seen a "skinhead" and possibly even the tattoos as he followed his lidless suspect at a slow speed for some 16 minutes. The "receiving of stolen property" line on an official report seems in fact reveal part of Trooper Witte's thinking and his profile: an absent trunk lid and a

"skinhead" with tattoos on his arms: "skinheads" receive stolen property or participate in other illegal activities – they even carry arms or contraband. Why a "skinhead" would lay the license plate on the back of the seat where Officer Witte could see it doesn't fit – so leave it aside. Mr. Bertoch was profiled – here is a skinhead without a trunk lid, therefore he must be involved in illegal activity. Mr. Bertoch waited a long while before Trooper Witte or someone else ran the license plate – only to discover that the plate indicated a valid and unexpired registration to Mr. Bertoch and the driver's license was restricted *only* by the requirement that Mr. Bertoch wear corrective lenses when he drives.

It is true that Trooper Witte alleges that he smelled the odor of alcohol coming from Mr. Bertoch – that is Trooper Witte's initial statement. He then, prior to giving any *Miranda* warnings, questions Mr. Bertoch who responds (and whose responses should be suppressed, as previously set forth) that he drank two beers about 90 to 120 minutes earlier – and that he used marijuana the previous night. These remarks come from a truthful and cooperative man – one who did not fully realize the consequences of his truthful statements.

Once Trooper Witte filled out the pre-prepared form for UHP DUI reports, the prejudice and pre-judgment of the UHP was revealed: Trooper Witte started with the odor of alcohol allegedly coming from Mr. Bertoch, but the UHP DUI Report pre-judges and pre-reports the allegation as not just the alleged odor of alcohol, but the "odor of an alcoholic beverage."

Officer Witte adopts the "alcoholic beverage" description in his own writings, not just in filling out the mandatory, expected pre-prepared form, and places the alleged and newly described odor of a *beverage* on Mr. Bertoch's breath.

But the alleged odor of alcohol coming from Mr. Bertoch or the later-alleged odor of an alcoholic beverage on Mr. Bertoch's breath need not have delayed Trooper Witte from "running" the license plate – especially since the records would have informed Officer Witte whether Mr. Bertoch had prior DUI arrests or had a stolen vehicle – which he did not. The information from checking the plate and the license is at least partially exculpatory – the common process of "running" license plates provides context, background and even some

amount of exculpation – but Trooper Witte preferred to turn elsewhere first because he had a "skinhead" and one with tattoos on his arms.

Trooper Witte observed green coloring and blisters on Mr. Bertoch's tongue – in the absence of medical information, Trooper Witte should only have speculated that the green coloring came from drinking green Kool Aid or sucking on green Skittles candy – or even from those vivid bubble gum balls that temporarily stain kids' mouths ghastly green, blasphemous blue or perilous pink.

The blisters on the tongue could indicate canker sores from allergies or small boils – which might be helped by a mouthwash containing alcohol. Even with the volunteered information about two beers earlier in the evening, Trooper Witte could not truly conclude that the alleged odor of alcohol would emanate from Mr. Bertoch for almost two hours after he drank beer (information, again, that must be suppressed).

This is a case that arises from profiling. The officer saw a tattooed skinhead and convinced himself that the man had to be guilty of something beside an improper plate. He allegedly smelled alcohol, at first just coming from Mr. Bertoch but consistent with the UHP's pre-prepared form, transformed into the odor of an "alcoholic beverage" coming from Mr. Bertoch's breath. The truthful statement (that must be suppressed) that Mr. Bertoch drank some beer about 2 hours earlier was not enough to indicate driving under the influence – nor was the statement (that must be suppressed) that Mr. Bertoch had smoked marijuana about 26 hours before the stop.

Had Mr. Bertoch been something other than a man with a skinhead and tattoos on his arms, Trooper Witte would have undoubtedly exercised his experience – and even his caution – with greater wisdom, checking the ownership of the vehicle and the driving record (with no prior dui arrests or convictions) and could have come to a better conclusion. Blood shot eyes, like canker sores, arise from allergies – and September 2001 was far from free of allergy-producing plants (which the Court may notice). Lack of balance from a man with two past broken ankles and a painful, crushed toe is not surprising. Nystagmus and blood shot eyes partly explain Mr. Bertoch's need for glasses – which were in his car. Because Mr.

Bertoch looks like a skinhead with tattoos, he is not granted the benefit of alternative reasoning by Trooper Witte. Profiling was present, active and basic to this case.

CONCLUSION

Based upon the foregoing arguments and upon the documents as produced in discovery, the statements by Mr. Bertoch and the items seized from him must be suppressed. Even more, all of the charges – with the exception of the improper display of the license plate not here challenged – must be dismissed with prejudice. Mr. Bertoch should be granted such other and further relief as may be just and proper.

Dated: April 19, 2002.

Respectfully submitted,

M. Karlynn Hinman

Original

FILED DISTRICT COURT
Third Judicial District

JUN 10 2001

SALT LAKE COUNTY

By _____
Deputy Clerk

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THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, SALT LAKE CITY DIVISION
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. TRAVIS BERTOCH, Defendant.	REPLY MEMORANDUM SUPPORTING MOTION TO SUPPRESS Case No. 001-919305 Honorable Dennis Fuchs

ARGUMENT

The *Terry* Frisk: The Pipe, Plastic Bag of "Green Leafy" Substance and Papers Should be Suppressed. Plaintiff has not challenged the decisions of the United States Supreme Court setting forth the scope of an initial *Terry* frisk. *Terry v. Ohio,* 392 U.S. 1 (1968). The first part of Plaintiff's answering brief admits the search that located the pipe was part of a frisk. The arresting Trooper admits the pipe he allegedly felt in Mr. Bertoch's trousers pocket could have been used for tobacco as well as for marijuana, although he over-anxiously testified that he had felt a pipe with marijuana residue in Mr. Bertoch's pocket. Transcript of Preliminary Hearing ("Tr.") page 22 line 25 – page 23 line 3.[1]

Since the Trooper was so certain what he had found (the pipe) during the frisk, he knew he was in no danger from the item he felt – and he felt nothing else in the pockets or on the person of Mr. Bertoch to cause him any concern about weapons or other things that could be harmful to him.[2] The Trooper's search exceeded the scope of a *Terry* frisk and the items seized at the scene of the stop should be suppressed, as argued more extensively in the initial brief.

Plaintiff cannot protect the seizures made in violation of *Terry* by arguing the items would have been located later anyway – Mr. Bertoch was entitled to the constitutional and legal protections carefully stated in *Terry* and its progeny, including *Minnesota v. Dickerson,* 508 U.S. 366 (1993), when the frisk began – a constitutional right cannot be so easily denied as the Plaintiff would have this Court rule.

Mr. Bertoch's Statements at the Stop Should Be Suppressed. Plaintiff, after ignoring entirely the legal scope and legal constraints on a *Terry* frisk, argues that the seizure of the pipe felt through Mr. Bertoch's pocket and the small plastic bag fished out of another

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[1] The Transcript was to be attached as Exhibit M to the opening brief. The certified transcript, completed by a court reporting service on Friday, June 7, 2002, is being filed with the Court. A copy of the "four-page per page" version is attached to this Brief for the convenience of the Court.

[2] During the Preliminary Hearing, the Trooper testified only briefly about the topic of officer's safety, the rubric that allegedly justifies extensive searches and other police conduct in pre-arrest and arrest situations. Here the Trooper said, in substance, he wanted to make the stop at a safe location because he had been rear-ended twice. The driver of a stopped car cannot cause rear-ending when the driver has been removed from the car. *See* Tr. page 13 lines 9 - 15.

pocket are part of a lawful seizure in connection with an arrest for paraphernalia. Having made this argument as a post-*Terry* justification for seizure of alleged paraphernalia, Plaintiff is now governed by the requirements of *Miranda*. *Miranda v. Arizona,* 384 U.S. 436 (1966). If Mr. Bertoch was under arrest and the Trooper questioned him, then the statements allegedly made by Mr. Bertoch must be suppressed because, according to the records prepared by or under the direction of the Trooper, Mr. Bertoch was not given *Miranda* warnings until well after the initial stop – after he had been *Terry*-frisked, questioned, in-fact searched, given field sobriety tests, transported to the street near a gas station for a blood test and finally taken to a jail facility where the Trooper's records report the reading of *Miranda*.

Plaintiff's arguments are internally inconsistent and create a dilemma: either the search was a *Terry* frisk prior to arrest so items obviously not weapons could not be removed then used as evidence of criminal activity (here, possession of paraphernalia and possession of marijuana) and must be suppressed *or* Mr. Bertoch was immediately under arrest and thus was entitled to *Miranda* warnings and anything he might have said should be suppressed.

The resolution of the dilemma created by the Plaintiff's arguments is simple: a Defendant cannot be convicted if the prosecution picks and chooses what legal restraints apply at what times – the Plaintiff's case must fail because of suppression; the Defendant is entitled to legal and constitutional protection.

Plaintiff's Citation of Authority Misinterprets the Law and Pertinent Facts. In citing a case from the Utah Supreme Court, Plaintiff argues at one point that *Miranda* did not apply to a routine traffic stop. A routine traffic stop is one that results in a warning ticket or a citation for some kind of traffic violation – whether it be driving with an improperly displayed license plate or speeding. When the routine traffic stop becomes something else, constitutional standards, including *Miranda* apply. Although the Plaintiff argues that Mr. Bertoch's statements before he received *Miranda* warnings should not be suppressed

because his statements occurred during a traffic stop, the argument is belied by at least three crucial factors.

First, the traffic stop was not routine because the Trooper demonstrated no intention whatsoever to issue a mere citation for improper display of a license plate – he could have run the plate number for the plate that was resting near the back window if that had been his interest, but he thought he might have a stolen vehicle, Tr. page 15 line 9, (because the trunk was absent even though it was clear to him that a license plate was near the back window of the trunkless car) but allegedly smelled alcohol (later an "alcoholic beverage") coming from Mr. Bertoch's person (making the stop immediately something other than a routine traffic stop).

Second, the Trooper testified that Mr. Bertoch *was not free to go* when the Trooper was investigating the alleged alcohol. Tr. page 24 lines 6 – 10.

Third, the Utah Supreme Court has examined, in the case cited by Plaintiff, when *Miranda* applies. *See Plaintiff's Answering Brief, page 3 Argument I, referring to Salt Lake City v. Womack,* 747 P.2d 1039, 1042 (Utah 1987) (*citing Berkemer v. McCarty*, 468 U.S. 420, 440 (1984)).

The United States Supreme Court, in the case cited by the Utah Supreme Court in *Womack*, carefully distinguishes between a routine traffic stop when the motorist reasonably expects he will be questioned about routine matters such as his identify, his vehicle and its licensing. (A printout of *Berkemer* is attached for the Court's convenience.) The motorist has no obligation to answer the questions, but the *Miranda* warnings are not mandatory when the stop is brief, the motorist remains in his vehicle and the stop involves some kind of traffic matter resolved by a traffic citation or ticket.

Here, the Trooper converted the routine stop by his actions and by his reports of what he allegedly believed. He testified that the absence of a trunk and the license plate resting flat near the rear window on a car was a "suspicion." Tr. pages 14 line 25 to page15 line 11. As a "suspicion," these factors justify only a *Terry* frisk – not the seizure

of something the Trooper immediately knew was not a weapon. The Trooper could not seize.

Once the Trooper allegedly smelled alcohol and allegedly saw reddened eyes,[3] the Trooper converted the routine stop to something much more important: he was detaining Mr. Bertoch as a suspect for the crime of driving under influence of alcohol (as well as the Trooper's pre-conceived notion that Mr. Bertoch was driving a stolen car because his car lacked a trunk). At that point, Mr. Bertoch was entitled to *Miranda* warnings and was, in fact, being detained. The Trooper could question but Plaintiff cannot expect any alleged statements by Mr. Bertoch to be admitted. Any statements attributed to Mr. Bertoch must be suppressed.

Nothing Can Overcome "Reasonable Doubt" about the Container of Alleged Methamphetamine. Rather than explaining why a small container allegedly removed from Mr. Bertoch's pocket during a search at the jail could begin as a "white" container but would be described in documents accepted several hours later by an evidence clerk as a "clear" container, Plaintiff says that Defendant and his counsel will be able to observe the alleged "evidence" at trial. That is no answer.

No matter what container is produced at trial, it is impossible to determine what alleged container was at the jail and what alleged container was received by a clerk for testing or storage as alleged evidence. The problem exists because of the records compiled by the prosecution, including those records and reports prepared and produced for and on behalf of the arresting Trooper. This is not just a weakness in the chain of custody; this is far more serious. The two descriptions of an alleged piece of evidence go to the heart of the evidence: the evidence *cannot* be identified from the records prepared

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[3] Plaintiff's Answering Brief, page 4, paragraph 2, line 4 of the paragraph, claims Mr. Bertoch's speech was "slurred." That assertion is not supported by the testimony of the Trooper and is not supported by any statement in the discovery documents that have been produced. The Trooper wrote that Mr. Bertoch was "slow," not that he was "slurred." The notion of "slurred" speech introduces a concept, connotation and fact not in evidence and should be stricken.

by and on behalf of the prosecution. And those records were made shortly after the arrest of Mr. Bertoch by the officials involved in the arrest and procedures surrounding the arrest.

Even if the Trooper, the jail Deputy, the evidence Clerk and the typists who worked on the reports are called to testify, their testimony in June 2002, approximately nine months after the date of the arrest, will be long after the events of September 19, 2001, the time of arrest. Moreover, it is doubtful that any one of the possible witnesses will have an independent recollection of the circumstances surrounding the September 19, 2001 event. Defendant requests the Court to take notice of these common facts: Clerks at the Section 16 facilities of the Utah Highway Patrol (*see Exhibit H to Defendant's initial Memorandum)*[4] receive items to be held as evidence virtually every single day of their employment – and likely received more items on some days than on others. They cannot be expected to have an independent recollection of an item identified in a signed or initialed report prepared several months ago.

Those persons engaged to assist in typing reports – assuming that they are not the Troopers themselves – use pre-prepared forms and are undoubtedly engaged with a daily work load commensurate with their ranks and status as members of the Utah Highway Patrol. They cannot be expected to remember individual reports or the information given to them in assisting with the preparation of a report.

Deputies assigned to the Salt Lake County jail facilities to assist with processing new arrestees undoubtedly have seen more persons arrested for alleged drug violations during the past nine months than just one or two. They cannot be expected to provide testimony now that would specifically clarify what was allegedly seized or why the allegedly seized container was described in different ways on the same night as the arrest.

The Trooper testified "Also, as a Highway Patrolman, I have made numerous arrests for controlled substance, many of which are marijuana." Tr. page 9 lines 1 – 4.

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[4] According to Exhibit H, Utah Highway Patrol Section 16 "Special Operations" Evidence and Property Report, the "clear" container was placed in an evidence locker at 0025 (just after midnight on September 20, 2001) and received by the property clerk at 10:00 a.m. on September 20, 2001, almost ten hours later. At the Preliminary Hearing, the Trooper described the container as "white." Tr. page 10 line1.

The alleged container of methamphetamine is simply unreliable evidence – not because of anything done or not done by Mr. Bertoch, but because of the written statements made and prepared on the night of the incident are inconsistent, confused and cannot provide a reasonable basis for the identification of alleged evidence central to the charge brought against Mr. Bertoch.

Because of the unreliability of the sole and central evidence of the charge of alleged possession of methamphetamine (the single felony charge in this matter), the alleged evidence must be suppressed and the charge dismissed – the Court need not allow the prosecution to take this charge beyond this motion.

The Profiling Issue. Mr. Bertoch, with shaved head and tattoos on his arms, could be a member of the so-called "skinheads," a loose group of white males who allegedly hold militant ideas or who behave in a militant or threatening manner to assert their own notions and positions with respect to the rights and interests of others. The Utah Highway Patrol forms describe Mr. Bertoch as having "blond" hair – but the only evidence introduced in support of this motion that was not produced on behalf of the prosecution (by the Utah Highway Patrol or by affidavits from offices or persons associated with the prosecution) is the brief affidavit from Mr. Bertoch's brother stating that Mr. Bertoch has never had blond hair and that his head was shaved on September 19, 2001 when he was arrested.

Once again, the discovery documents indicate the haste and carelessness of authorities underlying the charges in this case. No one paid enough attention to get the hair color correct – but anyone observing Mr. Bertoch could see that his head was shaved and that, if his arms are uncovered (as they had to be when the blood sample was taken street side at 2100 South and State Street), he has tattoos. These factors are part of the stereotype for "skinheads," a prejudicial and often politically disparaging grouping or category, a banality, even an insult. People who look like skinheads are notices for precisely the characteristic that gives the group its name: *skin*heads.

The Court is requested to notice that skinhead is a term of disparagement used to evoke prejudice, suspicion and even accusation based upon an obvious physical characteristic: a white male with a shaved head.

Was there profiling? While not admitted by any person or agency, profiling is virtually automatic based upon experience and observation – and here, with "suspicion" aroused because of the absence of a trunk on a car – the suspicion was magnified when Mr. Bertoch was observed. A subjective factor? Yes, of course. An insult to law enforcement? Not intended, but the protest is Shakespearean. Profiling is not the crux of this motion; the violation of Mr. Bertoch's rights and the need to suppress alleged evidence and statements is the central point. The motion must be granted with respect to all matters raised.

CONCLUSION

For the reasons set forth in the initial brief, the documents and discovery materials provided by the prosecution, the transcript of the preliminary hearing, the dilemmas raised by the prosecutions brief and for the foregoing reasons, Mr. Bertoch requests that his motion be granted and that all charges be dismissed.

Dated: June 10, 2002

Respectfully submitted,

M. Karlynn Hinman

CERTIFICATE

I certify that on this 10th day of June 2002 I caused a true and correct copy of the foregoing document to be served by hand on the following:

William Kendall, Esq.
Assistant Salt Lake County District Attorney
231 East 400 South
Salt Lake City, UT 84111.

M. Kathryn Edmiston

Addendum D

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Frank D. ZEPEDA, Defendant and Appellant.

No. 20020260-CA.

Sept. 5, 2003.

Sixth District, Kanab Department; The Honorable David L. Mower.

Mary Deiss Brown, Salt Lake City, for Appellant.

Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake City, for Appellee.

Before Judges JACKSON, ORME, and THORNE.

MEMORANDUM DECISION (Not For Official Publication)

JACKSON, Presiding Judge:

***1** Frank Zepeda challenges the trial court's denial of his motion to suppress, arguing (i) that the officer did not have probable cause to stop Zepeda's vehicle, and (ii) that the evidence and confession obtained during the stop were obtained in violation of Zepeda's Fifth Amendment *Miranda* rights. We affirm.

Zepeda first argues that, insofar as he was preparing to make a right-hand turn, he was justified in operating his vehicle outside of the normal lane of travel. This contention is not supported by the Utah Code, however, which clearly states that right-hand turns are to "be made as close as practical to the right-hand curb *or edge of the roadway.*" Utah Code Ann. § 41-6- 66(1) (1998) (emphasis added). Given the clear statutory distinction between the "roadway" and the "shoulder," *compare* Utah Code Ann. § 41-6-1(41) (Supp.2002) (defining "roadway" as the "portion of highway ... ordinarily used for vehicular travel, *exclusive of the ... shoulder* ") (emphasis added) *with id.* § 41-6-1(45) (defining "shoulder area" as "that area of the hard- surfaced highway separated from the roadway by a pavement edge line"), it is clear that Zepeda was required by law to stay within the proper confines of the roadway while preparing to make his right-hand turn.

Zepeda also argues that his use of the breakdown lane was justified by the fact that he was traveling at a slow rate of speed. This contention is incorrect. Under Utah law, "a vehicle proceeding at less than the normal speed of traffic ... shall be operated in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway." Utah Code Ann. § 41-6-53(2) (1998). By its express terms, Utah law allows for travel only in the "lane" or "roadway." Here, insofar as Zepeda was admittedly traveling outside of the defined "roadway," his use of the "breakdown lane" was not justified by his rate of speed. Thus, insofar as the officer personally observed Zepeda's illegal operation of his vehicle, we hold that the traffic stop was justified. [FN1]

> FN1. Zepeda also argues that his failure to operate his vehicle in a regular lane of traffic was caused by "faint or non-existent" markings at the side of the road. Zepeda fails to cite any legal authority, however, that would indicate that such a condition invalidates the officer's probable cause to effectuate a traffic stop. We accordingly decline to address the argument. *See Smith v. Four Corners Mental Health Ctr., Inc.,* 2003 UT 23,¶ 46, 70 P.3d 904 (citations omitted).

Zepeda next argues that the trial court erred in not suppressing Zepeda's admissions to the officer regarding his marijuana use. Specifically, Zepeda argues that the officer's conduct at the traffic stop subjected him to a custodial interrogation, thereby mandating *Miranda* warnings.

"It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.' " *Berkemer v. McCarty,* 468 U.S. 420, 440, 104 S.Ct. 3138, 3150 (1984) (citation omitted). In *Berkemer,* the United States Supreme Court specifically held that though "a traffic stop significantly curtails the 'freedom of action' " of the driver, *id.* at 436, 104 S.Ct. at 3148, the stop does not become custodial for *Miranda* purposes unless the circumstances of the stop "exert[ ] upon [the] detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination." *Id.* at 437, 104 S.Ct. at 3149. Thus, "[a] person may be 'seized' for Fourth Amendment

purposes but not be 'in custody' for Fifth Amendment purposes." *State v. Mirquet,* 914 P.2d 1144, 1147 (Utah 1996).

***2** "To determine if a person is in custody ... we look to ' "(1) the site of the interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of interrogation." ' " *State v. Brandley,* 972 P.2d 78, 81 (Utah Ct.App.1998) (quoting *Mirquet,* 914 P.2d at 1147). In accordance with these factors, we hold that the circumstances here were not such that Zepeda's privilege against self-incrimination was impaired. First, the site in which the questioning occurred was decidedly non-custodial, as the questioning occurred not in the intimidating confines of a patrol car or at the police station, but rather while Zepeda was in his own car. *Compare Mirquet,* 914 P.2d at 1147; *Brandley,* 972 P.2d at 83. Second, at the time of the questioning, it is apparent that the typical indicia of arrest, "such as readied handcuffs, locked doors or drawn guns," *Salt Lake City v. Carner,* 664 P.2d 1168, 1171 (Utah 1983), were not present. Third, the length and form of the interrogation were not such so as to resemble an arrest. There is no indication that the officer's questioning regarding the smell of marijuana emanating from Zepeda's car was accompanied by any direct accusations of illegal drug usage or by coercive orders that were calculated to induce Zepeda to confess to wrongdoing. *Compare Mirquet,* 914 P.2d at 1147-48. Further, there is no indication that the officer raised his voice in a threatening manner so as to intimidate Zepeda into cooperating with his questioning. *Compare Brandley,* 972 P.2d at 82. Finally, neither the length of time involved in the traffic stop nor the nature of the questioning resembled that which is typically found in an arrest. *Compare id.* (holding that a questioning which lasted "only ten to fifteen minutes" was not unduly coercive). Instead, we find that the officer's conduct was entirely consistent with a non-custodial traffic stop. We therefore hold that the trial court did not err in ruling that Zepeda's confession and the evidence obtained as a result of that confession were admissible.

Accordingly, we affirm.

WE CONCUR: GREGORY K. ORME and WILLIAM A. THORNE JR., Judges.

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